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IN THE

Supreme Court of the United States

October Term, 1978
No. 77-1834

JOHN H. LANG, *Appellant*

v.

CITY OF PHILADELPHIA
and
CHARLES E. DORFMAN
and
NICHOLAS D'ALESSANDRO
and
DAVID A. KRAFTSOW
and
ANDREW G. FREEMAN
and
KENNETH L. MOORE
and
STANLEY J. BERNSTEIN

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

Appellees move this Honorable Court to dismiss the appeal herein, or in the alternative, to affirm the decision of the Commonwealth Court of Pennsylvania on the ground that it is manifest that the question on which the decision of this action depends, is so insubstantial as to not need further argument.

OPINIONS BELOW

The opinion of the Court of Common Pleas of Philadelphia County (App. B, Jurisdictional Statement), has not been reported. The decision of the

Commonwealth Court of Pennsylvania (App. A, Jurisdictional Statement) is reported at 31 Pa. Comm. Ct. 537, 377 A.2d 849 (1977). The denial of Appellant's Petition for Allowance of Appeal by the Supreme Court of Pennsylvania (App. C, Jurisdictional Statement) has not been reported.

COUNTER-STATEMENT OF ISSUES PRESENTED

I. Where a non-resident of the City of Philadelphia is employed upon a federal enclave located within the City of Philadelphia, is imposition by the City of an Income Tax upon the wages earned by said non-resident within the City valid, legal and constitutional?

II. Was the Court below correct in concluding that the decision of the Supreme Court of Pennsylvania upholding the constitutionality of the Philadelphia Income Tax does not distort the intendment of the legislative enactment but merely interprets it?

III. Was the Court below correct in concluding that non-residents of Philadelphia employed therein do receive benefits from the City of Philadelphia?

IV. Was the Court below correct in concluding that the exemption of wages earned by members of the United States Armed Forces is a reasonable classification and does not violate the equal protection clause of the United States Constitution?

V. Was the Court below correct in concluding that imposition of the Philadelphia Income Tax does not violate any constitutional right to travel and does not place a chilling effect and burden on interstate movement?

COUNTER-STATEMENT OF THE CASE

This action was instituted by Appellant on August 25, 1975, by the filing of a Complaint in Equity against the City of Philadelphia, Honorable Charles E. Dorfman, Revenue Commissioner, Nicholas M. D'Alessandro, Esquire,[1] David A. Kraftsow, Esquire, Andrew Freeman,[2] Kenneth L. Moore and Stanley J. Bernstein, C.P.A., Chairman and members of the City of Philadelphia Tax Review Board respectively. In Count I thereof, against the City and the members of the Tax Review Board, appellant sought an injunction restraining the Tax Review Board from acting upon a Petition for Review, which he had filed on July 29, 1975, challenging a Philadelphia Income Tax assessment made by the City of Philadelphia Department of Revenue for the year 1974 in the amount of $204.56 plus interest and penalties.

In Count II thereof, against the City of Philadelphia and Commissioner Charles E. Dorfman, the only fact averred by Appellant in support of a prayer for an injunction restraining the assessment and collection of the Philadelphia Wage Tax from Appellant, is that he was employed by the United States Government as a senior civilian in the Office of Pera (Crudes) at the United States Naval Shipyard, League Island, U.S.A.[3] Appellant further averred bold and knowingly untrue conclusions of law.

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1. Who has since resigned from the Tax Review Board to assume a seat on the Bench of the Municipal Court of Philadelphia.

2. Who has since resigned from the Tax Review Board.

3. Contrary to the statement contained in footnote 1 of Appellant's Jurisdictional Statement (at 5 thereof) where the Commonwealth of Pennsylvania ceded land now occupied by the United States Naval Shipyard to the United States the right to serve civil and criminal process was *not* the only reservation made. The Commonwealth, on behalf of itself and its political subdivisions, *also reserved the right to levy and collect taxes on property, persons and franchises within the boundaries so ceded.* 74 P.S. 120.49. See Appendix "A" hereof.

In Count III thereof, against the City of Philadelphia and Commissioner Charles E. Dorfman, Appellant avers, in support of his prayer for an injunction restraining the assessment and collection of Philadelphia Wage Tax from Appellant, no facts, only conclusions of law that he received no benefits from the City of Philadelphia.

In Count IV thereof, against the City of Philadelphia and Commissioner Dorfman, Appellant again avers, in support of his prayer for an injunction restraining the assessment and collection of Philadelphia Wage Tax from Appellant, no facts, only conclusions of law that he does not have the right to vote in any elections in the City of Philadelphia or the Commonwealth of Pennsylvania.

In Count V thereof, against the City of Philadelphia and Commissioner Dorfman, Appellant again avers, in support of his prayer for an injunction restraining the assessment and collection of Philadelphia Wage Tax from Appellant, no facts, only conclusions of law that the Philadelphia Wage Tax is an "employment" tax (which is patently untrue), which is only imposed upon non-residents of the City of Philadelphia.

In Count VI thereof, against the City of Philadelphia and Commissioner Dorfman, Appellant avers, in support of his prayer for an injunction restraining the assessment and collection of Philadelphia Wage Tax from Appellant, that the Philadelphia Income Tax Ordinance exempts from taxation earnings of members of the active United States Armed Forces and that he is a non-member of the active United States Armed Forces. Appellant further averred therefrom the conclusion of law that said exemption is a violation of his constitutional rights.

In Count VII thereof, against the City of Philadelphia and Commissioner Dorfman, Appellant avers, in support of his prayer for an injunction restraining the assessment and collection of Philadelphia Wage Tax

from Appellant, that he travels into the City and County of Philadelphia and the Commonwealth of Pennsylvania in order to reach the situs of his employment. Appellant further avers the conclusions of law that the wage tax imposed is disproportionate to the services received and therefore imposition of the tax places a chilling effect on Appellant's right to travel.

In Count VIII thereof against the City of Philadelphia and Commissioner Dorfman, Appellant, without a single fact in support thereof, accuses Appellees of not assessing non-residents who are subject to the Philadelphia Wage Tax Ordinance and are thereby following a policy of selective assessment and discriminatory enforcement in violation of his constitutional rights. Again, no facts are averred in support of the prayer for an injunction restraining the assessment and collection of Philadelphia Wage Tax from Appellant.

In response thereto, Appellees filed complete and comprehensive Preliminary Objections for numerous reasons. These objections can be summarized as follows:

1. Lack of jurisdiction in the court to restrain the assessment and collection of a validly imposed tax.
2. Lack of jurisdiction in the court to restrain an administrative agency from performing its duties.
3. Lack of jurisdiction due to an adequate remedy at law.
4. Demurrer for failure to state a cause of action since the courts have already ruled on the issues contained herein.
5. Demurrer for failure to exhaust administrative remedies.
6. A motion to strike off a pleading due to the fact that the complaint on its face presents an inconsistent pleading.

7. A motion to strike off a pleading due to the averring of scandalous and impertinent matter.

8. A motion for a more specific pleading to cure the total void of facts alleged with respect to the irreparable harm visited upon Appellant and the alleged policy of selective assessment and discriminatory enforcement of the Wage Tax Ordinance.

9. A motion to strike for failure to comply with Rule 1019(a) Pa. R.C.P. in that Appellant failed to set forth all material facts in a concise and summary form.

10. Chancellor shall not grant relief in equity to a party coming to the court with unclean hands.

In response thereto Appellant filed a paragraph by paragraph answer to Appellees' Preliminary Objections. Since Appellees' Preliminary Objections took the form of Motions to Strike, Demurrer and Motions for More Specific Pleading (as well as challenges to the jurisdiction of the lower court), Appellant's answer thereto was in violation of Local Rule 1017(a)*(1). Accordingly, Appellees filed Preliminary Objections to Appellant's Answers to Preliminary Objections. As a result thereof, Appellant filed an amended answer to Preliminary Objections in compliance with Local Rule 1017(a)*(1) limiting the scope thereof to those paragraphs challenging the jurisdiction of the lower court.

After hearing argument on the Preliminary Objections, on April 13, 1976 the Honorable James R. Cavanaugh, Judge of the Philadelphia Court of Common Pleas, sustained Appellees' demurrer and dismissed the Complaint (Jurisdictional Statement, App. "B" at A16). In its Opinion the lower court held that all constitutional issues raised herein had previously been decided adversely to Appellant. Consequently, under the doctrine of *stare decises* Appellant has no cause of action.

Contrary to Appellant's quote out of context at page 6 of Jurisdictional Statement, the trial court did not summarily reject his constitutional arguments. Even a cursory reading of the opinion, Jurisdictional Statement, App. "B" will disclose that the court therein gave full and complete consideration to each and every argument raised by appellant and that it was not until each one was disposed of that the court concluded that the arguments raised were wholly and totally baseless.

It should be noted here that the lower court did not rule on any of the other preliminary objections filed by Appellees (Jursidictional Statement, App. "B" at A6-A16, inclusive). An appeal followed to the Commonwealth Court of Pennsylvania which heard argument thereon on April 5, 1977 and which affirmed the decision of the Court of Common Pleas on September 12, 1977. (App. "A" at A1-A5, inclusive, Jurisdictional Statement). On or about October 13, 1977, Appellant filed a Petition for Allowance of Appeal from the Order of the Commonwealth Court with the Supreme Court of Pennsylvania. On March 29, 1978, the Prothonotary of the Supreme Court of Pennsylvania advised Appellant that on March 23, 1978 that Court had denied his Petition (Jurisdictional Statement, App. "C" at A17). On or about June 15, 1978, Appellant filed with the Prothonotary of the Commonwealth Court of Pennsylvania a Notice of Appeal to this Honorable Court under the authority of 28 U.S.C. § 1257(2). (Jurisdictional Statement, App. "D" at A18). On or about June 23, 1978 Appellant filed a Jurisdictional Statement with this Honorable Court in which he sets forth issues in support of Counts, II, III, VI and VII, respectively and in which he abandons issues set forth in Counts I, IV, V and VIII, respectively. See pages 3-5 hereof for description of each of the respective counts herein. This Motion to Dismiss or Affirm is filed in opposition thereto for the following reasons.

SUMMARY OF REASONS FOR DISMISSING OR AFFIRMING APPEAL

1. The concept and propriety of imposing an income tax upon non-residents of the taxing jurisdiction is one that has been litigated and sustained by this Honorable Court since 1920. *Shaffer v. Carter*, 252 U.S. 37 (1920). This particular tax, the Philadelphia Wage Tax, has been before this Honorable Court either directly or indirectly five times and each and every time certiorari was either denied or the decision below was affirmed on motion. *Kiker v. Philadelphia*, 346 Pa. 624, 31 A.2d 289, cert. den. 320 U.S. 471 (1943); *Application of Thompson*, 157 F. Supp. 93, aff'd 258 F.2d 320, cert. den. 358 U.S. 931 (1957); *Non-Resident Taxpayers Association v. Philadelphia, et al.*, 341 F. Supp. 1135, aff'd 406 U.S. 951 (1972), 341 F. Supp. 1139, aff'd 478 F.2d 456 (1973); *Non-Resident Taxpayers Association v. Murray*, 347 F. Supp. 399, aff'd 410 U.S. 919 (1972); and, *City of Philadelphia v. Kenny, et al.*, 28 Pa. Comm. Ct. 531, 369 A.2d 1343, cert. den. U.S. ,54 L.Ed. 2d 281 (1977).

2. It is has been held on innumerable occasions that Appellant and those similarly situated do receive services and benefits from the City of Philadelphia, their protestations to the contrary notwithstanding. *Kiker*, supra; *Kenny*, supra.

3. The Philadelphia Wage Tax Ordinance has been held to comply with all equal protection requirements of the Fourteenth Amendment to the United States Constitution. See *Kiker*, supra and *Kenny*, supra. Notwithstanding the foregoing, the specific exemption created therein for income earned by military personnel is based upon a reasonable classification which takes into consideration the incidents and hardships associated with military service. *Philadelphia v. Farrell*, 35 D&C 2d 177, aff'd per curiam, 205 Pa. Super. 263 (1965). *August v. Bronstein*, 369 F. Supp. 190, aff'd 417 U.S. 301 (1974).

4. The Philadelphia Wage Tax Ordinance neither creates any classification nor discriminates in any manner whatsoever on the basis of longevity within the jurisdiction. All persons working within the City, as well as residents working outside the City, are required to pay this tax equally. Therefore, there is no tax on Appellant's right to interstate travel.

REASONS FOR DISMISSING OR AFFIRMING APPEAL

THE CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS HONORABLE COURT.

A. WHERE A NON-RESIDENT OF THE CITY OF PHILADELPHIA IS EMPLOYED UPON A FEDERAL ENCLAVE LOCATED WITHIN THE CITY OF PHILADELPHIA, IMPOSITION BY THE CITY OF AN INCOME TAX UPON THE WAGES EARNED BY SAID NON-RESIDENT WITHIN THE CITY IS VALID, LEGAL AND CONSTITUTIONAL.

This Complaint in Equity, dismissal of which is now before this Honorable Court, begins a new episode in the continuing struggle between non-residents of the City of Philadelphia employed at various Federal agencies within the City of Philadelphia that has been waged for over thirty-five years. Ever since the original enactment of the Philadelphia Wage Tax Ordinance, non-residents employed at Federal agencies within the City of Philadelphia have attacked the validity and constitutionality of this Ordinance. Each and every time they have failed to have it overturned. See discussion of all cases infra.

In *Non-Resident Taxpayers Association v. Murray*, 347 F. Supp. 399, aff'd 410 U.S. 919 (1972), the lower court specifically stated, in a case involving a collateral attack upon the constitutionality of the ordinance:

> The authority of the City of Philadelphia to require non-resident employees to file tax returns and to pay a wage tax *can no longer be controverted.* 347 F. Supp. at 401 (Emphasis added).

As recently as in *City of Philadelphia v. Edward Konopacki and George Martin*, 27 Pa. Comm. Ct. 391, 366 A.2d 608 (1976), allocatur denied Pa. Supreme Court, the City of Philadelphia's right to collect a fine from those civilian federal employees employed within the City of Philadelphia who refuse to pay Philadelphia Wage Tax was sustained. In reaching its decision the Commonwealth Court stated:

> Appellee [City of Philadelphia] *unquestionably* has the power to "levy and collect" taxes on income earned within its borders, even by non-residents employed in a federal area. *Non-resident Taxpayers Assn. v. Municipality of Philadelphia*, 341 F. Supp. 1139, 1142 (D.N.J. 1971), aff'd mem. 406 U.S. 951 (1972); *Kiker*, supra, at 633, 31 A.2d at 294. (Emphasis added). 366 A.2d at 609.

Even more recently, in *City of Philadelphia v. Kenny, et al.*, 28 Pa. Comm. Ct. 531, 369 A.2d 1343 (1977), cert. den. U.S. , 54 L.Ed.2d 281 (1977),[4] thereby letting stand the decision of the Commonwealth Court, the entry of judgments against defendants therein for the delinquent taxes claimed by the City of Philadelphia was affirmed. In those cases defendants were all similarly situated to Appellant herein, and each challenged the constitutionality of the Philadelphia Wage Tax. In rejecting this argument the Commonwealth Court stated:

> The constitutionality of the Philadelphia Wage Tax has been subject to continuing challenge over its nearly 37 year history under both the Pennsylvania and the United States Constitutions. Most of

4. While the issue of constitutionality of the Philadelphia Wage Tax was not specifically presented by petitioners therein in their Petition for Certiorari, that issue was specifically raised by them as a defense below and could have been considered by this Honorable Court if it deemed appropriate.

these challenges have been by New Jersey residents working in federal establishments in Philadelphia. They have been brought in both state and federal courts. *The tax has been attacked from almost every conceivable angle:* as violating due process, equal protection, uniformity, and federal immunity; as infringing upon the privilege against self-incrimination; as unreasonably burdening interstate commerce; as impairing the obligation of contract; and as offending the privileges and immunities clause. *Yet in each instance the tax has passed constitutional muster.* (citations omitted).

For many years *New Jersey residents who are federal employees within the boundaries of Philadelphia have been fighting to evade, or avoid, or find sanctuary from their responsibility as users of the services provided by the City of Philadelphia by fighting and not paying a wage tax which was first applied to this non-resident class in 1942.10/* It took Acts of Congress and opinions of the Supreme Courts of both the federal and the state judiciary to resolve the issue of the authority of Philadelphia to tax wages earned inside its city limits. All of that is behind us now. *Yet these same constitutional questions are still mentioned in the briefs in the appeals currently before us,* apparently in the hope that some appellate court somewhere will change the law. That is not likely to happen, and it will not happen in this case. Suffice it to say that *questions of the constitutionality of the Philadelphia Wage Tax Ordinance and its application to non-residents of the City working within Philadelphia have long since been put to rest, and we will not exhume those issues merely to verify that they are dead.*

10. Having just witnessed the Bicentennial year, when the people of New Jersey and Pennsylvania as well as the people of their sister States have so genuinely shown concern

for one another, *it is ironic that these cases continue on in what this writer believes to be a frivolous and vexatious manner.* There is no question that there have been serious constitutional questions, but they have been resolved many years ago, and yet, many New Jersey residents who desire, understandably, to avoid any more taxation are still attempting to take all the benefits they can wring out of the City of Philadelphia without paying for same. This writer need not go into a litany of beneficial services provided by the City. It is sufficient to point to the provision of health care, fire and police protection, to the use of the streets, sewers, water, and other utilities; to the use of Philadelphia's hospitals, universities; colleges, museums, aviaries, libraries, zoo, and conservatory, none of which facilities pays taxes. Enough is said concerning the benefits that the New Jersey residents are unfairly reaping at the expense of the Philadelphia taxpayers. In 1977 most reasoning adults who have any familiarity with the front pages of their respective newspapers know that large metropolitan areas, especially cities like Philadelphia and New York, are close to bankruptcy because of the high cost of everything. Inflation hits government as well as it hits the private citizen. The people of this country must come to realize that in order to save the cities, which perform functions which make this country work, the cities cannot continue to provide services to non-residents without some kind of compensation. To hold otherwise would be to fail to realize that municipal overburden is one of the most important defects in the operation of local governments in this country. (Emphasis added) 369 A.2d at 1353-1354.[5]

In Counts II through VIII Appellant raised numerous issues concerning the constitutionality of the Philadelphia Wage Tax Ordinance. Virtually all of these questions have been decided "ad nauseum" for over thirty years, unanimously against the taxpayers. The Philadelphia Wage Tax Ordinance, as codified in 19-1500 et seq. of the Philadelphia Code, a copy of which is reproduced herein, in its entirety, as Appendix "B," was first enacted in 1939. Immediately thereafter

5. Especially in view of this quotation, if pursuing persons who for 40 years have flagrantly violated valid local tax laws constitutes municipal avarice, then every taxing authority in these United States, including the federal government is also guilty thereof.

the constitutionality of the ordinance was attacked, and in *Dole v. Philadelphia*, 337 Pa. 375, 11 A.2d 163 (1940), was sustained. Again, the constitutionality of this Ordinance was attacked, as it applies to Federal employees employed at the United States Naval Shipyard on League Island in Philadelphia. Again, the constitutionality was sustained. *Kiker v. Philadelphia*, 346 Pa. 624, 31 A.2d 289, cert. den. 320 U.S. 741 (1943). Since that time there has ensued a continuing struggle between the City of Philadelphia and non-residents of Philadelphia employed by the Federal government within Philadelphia. In each and every test the constitutionality of the tax was challenged directly or raised collaterally in efforts attacking collection measures. See *City v. Schaller*, 148 Pa. Super. 276, cert. den. 317 U.S. 649 (1942); *Application of Thompson*, 157 F. Supp. 93, aff'd. 258 F.2d 320, cert. den. 358 U.S. 931 (1957); *Non-Resident Taxpayers Association v. Philadelphia, et al.*, 341 F. Supp. 1135, aff'd 406 U.S. 951 (1972), 341 F. Supp. 1139, aff'd 478 F.2d 456 (1973); and *Non-Resident Taxpayers Association v. Murray*, 347 F. Supp. 399, aff'd 410 U.S. 919 (1972). In *Murray* the lower court specifically stated that the City's right to assess and collect this tax "can no longer be controverted." 347 F. Supp. at 401.

In *Kiker*, taxpayer therein was a resident of the State of New Jersey who derived income from his employment by the United States Government at the Philadelphia Naval Yard, a federal area on League Island in the 26th and 48th wards of the City of Philadelphia, 74 Pa. C.S.A. 120.46 et seq., the very same federal installation at which Appellant is employed. The issues raised and decided by the Pennsylvania Supreme Court were threefold:

> 1. The Philadelphia Wage Tax is an attempt to tax compensation for services rendered by non-residents outside the City of Philadelphia.

> 2. The Philadelphia Wage Tax is an attempt to tax compensation of persons who received no protection or benefits from the City; and
>
> 3. The Philadelphia Wage Tax is an attempt to tax compensation earned as a result of employment by the Federal Government.

To each of these issues this Court clearly and decisively held the City of Philadelphia had the right to levy and collect its wage tax, and even then, thirty-five years ago, this Honorable Court did not feel this issue needed further review by this Court. It is submitted that today further review of these issues is still unwarranted.

In *Schaller*, a Philadelphia resident employed upon the U.S. Naval Shipyard on League Island in Philadelphia challenged the imposition of the Philadelphia Wage Tax upon his earnings within the Navy Yard. Again, the City's right to levy and collect the Philadelphia Wage Tax was sustained.

In *Application of Thompson*, taxpayer therein, also a *non*-resident, a civilian employee at the Philadelphia Naval Shipyard, filed a petition for a Writ of Habeas Corpus seeking his release from custody of a Philadelphia County Deputy Sheriff who had arrested him pursuant to a Writ of Capias ad Respondendum. In dismissing the habeas corpus the court of necessity was forced to first face the question of whether the City of Philadelphia had the right to levy and collect its wage tax. It concluded it did. To reach this conclusion the Court noted:

> This [Buck] Act has been construed to authorize a City to impose a tax on civilian employees of the U.S. Navy for the privilege of working in a naval ordinance plant located in such city.[13] (citation omitted). It has been recognized for many years that income of non-resident federal employees earned in a state of subdivision may be taxed by

such jurisdiction. *Shaffer v. Carter*, 1920, 252 U.S. 37, 52, 53, 55, 40 S. Ct. 221, 64 L.Ed. 445. . . .

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13. The allegations of the petition that petitioner uses a ferry to cross the Delaware River directly to the Shipyard and that he has no contacts with other parts of Philadelphia does not exempt him from tax for the reasons stated in *Kiker v. City of Philadelphia*, supra . . .

In *N.R.T.A. v. Philadelphia*, supra, the organization representing that group of individuals who are civilian federal employees employed within Philadelphia filed a class action complaint challenging the constitutionality of the Philadelphia Wage Tax. In that case plaintiffs therein raised virtually the identical constitutional issues as Appellant herein raises. For comparision of the issues raised therein to the issues raised in the instant case, see copy of Complaint in *N.R.T.A. v. Philadelphia*, attached hereto as Appendix "C." See paragraphs 2, 5, 15, 16, 18, 19, 20, 25, 26, 28-40, 44 thereof. In that case, plaintiffs asked for the convening of a three judge constitutional court. Upon motion of the Municipality of Philadelphia the three judge court was dissolved (341 F. Supp. 1135) and this Honorable Court affirmed dissolution thereof (406 U.S. 951). Upon remand to a single judge of the United States District Court for New Jersey, the court ruling upon the merits of the case, and citing *Shaffer v. Carter*, 252 U.S. 37 (1920), this Court's time honored landmark decision sustaining the constitutionality of taxation of non-residents, held the Philadelphia Wage Tax was constitutional (341 F. Supp. 1139). Upon appeal to the Third Circuit Court of Appeals the District Court's decision of Judge Cohen was affirmed on the basis of the taxpayer having an adequate remedy at state law (478 F.2d 456). However, at page 458-59 Judge Gibbons, writing for the Third Circuit, stated:

> Indeed, the power of the City of Philadelphia to tax wages of non-residents earned in the Philadelphia Navy Yard has been litigated in the Courts of the Commonwealth. *Kiker v. Philadelphia* [supra]. The *Kiker* case recognizes the taxing power here challenged.

* * *

> The Johnson Act, then, is a sufficient reason for sustaining the dismissal of the Complaint for injunctive relief against the municipal ordinance without reaching the issue of its alleged unconstitutionality as applied to a federal enclave. We note, however, that the Buck Act, 4 U.S.C. §106, . . .appears to provide ample justification for the decision of the Supreme Court of Pennsylvania in *Kiker v. Philadelphia*.

In *N.R.T.A. v. Murray*, the same organization brought another class action challenging the constitutionality of the Philadelphia Wage Tax. In this action plaintiffs therein sought to have the capias procedure used by the City of Philadelphia to enforce collection of delinquent taxes declared unconstitutional. In order to rule upon the question of the constitutionality of this procedure it was again essential for the court to first determine the tax was constitutional. The three judge constitutional court convened therein so held. See opinion of lower court at 347 F. Supp. at 401, the City's right to assess and collect its wage tax "can no longer be controverted." See also *Konopacki and Martin*, supra, at 11 hereof.

The concept and problems relating to the imposition of state and local income taxes by the taxing authority where the taxpayer is employed, and where said taxpayer is a non-resident of that jurisdiction is a problem which is not limited to Philadelphia alone (even though it has been in the forefront of this litigation). Contrary to Appellant's assertion, this is not a case of first impression. The issues presented herein involve concepts that have been the subject of voluminous liti-

gation, nationwide, and there have been many, many decisions of both state and federal courts, *including this Court*, all of which have sustained this concept where said tax is imposed in a non-discriminatory fashion. *Shaffer v. Carter*, supra; *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 64 L.Ed. 460, 40 S.Ct. 228 (1920); *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 85 L.Ed. 267, 61 S.Ct. 246, 130 A.L.R. 1229, reh. den. 312 U.S. 712, 85 L.Ed. 1143, 61 S.Ct. 444 (1940); *Howard v. Commissioners of Louisville*, 344 U.S. 624, 73 S.Ct. 465, 97 L.Ed. 617 (1953) *(involving validity of imposition of the tax upon civilian employees employed upon a federal enclave); American Commuters Association v. Levitt*, 405 F.2d 1148 (C.A. 2, 1969); *Dooley v. Detroit*, 370 Mich. 194, 121 N.W. 2d 724 (1963); *Angell v. Toledo*, 153 Ohio St. 179, 41 Ohio Ops. 217, 91 N.E. 2d 250 (1950); *Arnold v. Berra*, 366 S.W. 2d 321 (Mo. 1963); *Norristown v. Erdek*, 1 Comm. Ct. 577, 275 A.2d 911 (1971). See also *Annotation*, 15, A.L.R. 1326, 1331; 90 A.L.R. 484, 489; 156 A.L.R. 1370, 1373; 48 A.L.R. 3d 343, 347; 71 *Am. Jur.* 2d, State & Local Taxation §467; and Hellerstein, W., Some Reflections on the State's Taxation of a Non-resident's Personal Income, infra.

In those cases where the tax was held to be invalid the deficiency was clearly the disparate treatment between non-residents and residents. See e.g., *Austin v. New Hampshire*, 420 U.S. 657, 43 L.Ed. 2d 530 (1975). In *Austin*, the taxpayer therein was a resident of the State of Maine who was employed within the State of New Hampshire. Therefore, Austin was subject to the New Hampshire Commuter Income Tax which imposed a four percent (4%) tax on income in excess of $2,000 earned by non-residents of New Hampshire, only, who were employed within New Hampshire. As a result thereof, this Court noted that it is on the basis of this disparate treatment of residents and non-residents that appellants challenged New Hampshire's right to

tax their income from employment in that State. 420 U.S. at 659.

In holding that this tax violated the Privileges and Immunities clause of the United States Constitution, Article IV, Section 2, Clause 1, this Court went to great lengths to demonstrate that its decision was based upon the *inequality of treatment* given residents and non-residents of New Hampshire, citing *Ward v. Maryland*, 79 U.S. (12 Wall) 418 (1870); *Travelers' Insurance Company v. Connecticut*, 185 U.S. 364 (1902); and *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920). In fact, in invalidating the New Hampshire Tax this Court in 1975 cited with approval *Shaffer v. Carter*, 252 U.S. 37 (1920), as being good law since there was equality of treatment therein. In discussing *Shaffer*, the Court stated:

> *Shaffer* upheld the Oklahoma tax on income derived from local property and business by a non-resident where the State also taxed the income — from wherever derived — of its own citizens. Putting aside 'theoretical distinctions' and looking to 'the practical effect and operation' of the scheme, the non-resident was not rated more onerously than the resident in any particular, and in fact, was called upon to make no more than his ratable contribution to the support of the State government. 420 U.S. at 664.

In the instant case the Philadelphia Wage Tax is also imposed upon income of residents from wherever derived as well as income of non-residents derived from Philadelphia. Philadelphia Code 19-1502(1)(a) and (b). No non-resident of Philadelphia is being treated any differently from any resident of Philadelphia.

It is respectfully submitted that it is clear that the Courts have unanimously upheld the constitutionality of the Philadelphia Wage Tax in many cases, since its

inception in 1939, and this Court in particular has consistently sustained the concept of taxing income earned by non-residents of a taxing jurisdiction within that taxing jurisdiction so long as it was likewise imposed upon residents thereof. Accordingly, this Honorable Court should not dignify the instant case with the stature of a case meriting further review.

B. APPELLANT'S ARGUMENTS ARE WHOLLY WITHOUT MERIT

(1) The Court Below was Correct In Concluding That The Decision Of The Supreme Court Of Pennsylvania Upholding The Constitutionality Of The Philadelphia Income Tax Does Not Distort The Intendment Of The Legislative Enactment But Merely Interprets It.

Appellant's initial argument is that the doctrine of *stare decisis*, as relied upon by the lower court herein need not be followed since this Honorable Court's denial of certiorari in *Kiker*, supra, let stand a distortion of "the Clear Intention of a Legislative Enactment," specifically the *Buck Act*, 4 U.S.C. §105 et seq. This position is based upon the erroneous premise that it has "always been the law of the United States that income earned as a non-resident upon such enclaves was not within the taxing jurisdiction of the state within which the enclave was located" (Jurisdictional Statement at 11).

Assuming arguendo that Appellant is historically correct, that is not the law today and has not been the law since enactment of the *Public Salary Tax Act*, 5 U.S.C. §84(a) (1939), and the *Buck Act*, 4 U.S.C. §105 et seq. (1941).

Upon examining the legislative history of the Buck Act and Appellant's analysis thereof, vis a vis the Pennsylvania Supreme Court's decision in *Kiker*, it is clear that it is either Appellant's concept of what the

law should be that is distorted or he is intentionally attempting to mislead this Honorable Court.

In *Kiker*, the Court was faced with the exact question Appellant herein raises — construction of the Buck Act, 346 Pa. at 635. After tracing the history of taxation of individuals and business deriving income from activities performed on federal enclaves the Pennsylvania Supreme Court took specific note of:

> The Act of April 12, 1939, c. 59, Title I, Section 4-953 Stat. 575, 5 U.S.C.A. Section 84(a), called the Public Salary Tax Act, whereby employees of the United States Government were rendered subject to taxation by the State within which they reside, regardless of whether or not their compensation was earned on a Federal reservation. As the result of this Statute, a State could tax its own residents for income earned on Federal property, and could tax non-residents and residents of a United States reservation for income earned within the State proper, but could not tax non-residents or residents of a Federal area for income earned within the Federal area. *State taxation of persons employed on Federal territory thus lacked uniformity, the resident of the State being subjected to taxation, while the non-resident employee, such as plaintiff, and the resident of the Federal area escaped.* There was likewise a lack of uniformity in State taxation of non-residents, other than Federal employees, where the particular State had not reserved in its consent the power to tax in the United States' territory, in that those who earned income on the reservation were immune or exempt from State taxation, while those working elsewhere in the States were subject to it. *For the purpose of correcting these anomalous situations, it seems to us, and to enable State taxation to fall alike upon all who earned income in the State within whose boundaries the reser-*

vation was located, and in recognition of the generosity of the States which had granted to the Federal government exclusive jurisdiction over land within their respective territorial limits without reserving the right of taxation, Congress, in the best interests of our dual form of government, enacted Public Act No. 819. [Buck Act]. *That these were the reasons for the passage of this statute is substantiated by the Report of a subcommittee of the Committee on Finance of the United States Senate,* wherein it was stated: "Section 2(a) of the Committee amendment removes the exemption from income taxes levied by a State, or any duly constituted taxing authority in a State, where the exemption is based solely on the ground that the taxpayer resides within a Federal area or receives his income from transactions occurring or services performed in such area. *One of the reasons for removing the above exemption is because of an inequity, which has arisen under the Public Salary Tax Act of 1939. Under that act a State is permitted to tax the compensation of officers and employees of the United States when such officers and employees reside or are domiciled in that State but is not permitted to tax the compensation of such officers and employees who reside within Federal areas within such State.* For example, a naval officer who is ordered to the Naval Academy for duty and is fortunate enough to have quarters assigned to him within the Naval Academy grounds is exempt from the Maryland income tax because the Naval Academy grounds are a Federal area over which the United States has exclusive jurisdiction, but his less fortunate colleague, who is also ordered there for duty and rents a home outside the Academy grounds because no quarters are available inside, must pay the Maryland income tax on his Federal salary. Another

reason for removing the above exemption is that under the doctrine laid down in *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937), a State may tax the income or receipts from transactions occurring or services performed in an area within the State over which the United States and the State exercise concurrent jurisdiction but may not tax such income or receipts if the transactions occurred or the services were performed in an area within the State over which the United States has exclusive jurisdiction.

It is clear, therefore, from the obvious purposes of the Act, as indicated by its language and by the decisions and legislation which preceded it, corroborated by the views expressed by the Senatorial committee which considered it, that Congress intended it to apply to just such a situation as we have here before us. Plaintiff claims, however, that the phrase "having jurisdiction to levy such a tax" renders the Statute inapplicable to him because prior to its enactment the City of Philadelphia had no jurisdiction to impose taxes on League Island. Such a construction is the equivalent of saying that Congress merely intended to tax persons whom they were already permitted to tax. We cannot permit such an absurd construction to nullify this legislation. Cf. *Superior Bath Co. v. McCarroll*, 312 U.S. 176, 178. The phrase in question is obviously descriptive of the language preceding it and refers to the *power* of the taxing authority to impose the type of tax mentioned; it does not refer to its jurisdiction over the territory. 346 Pa. at 636-638. (Emphasis added).

It is clear from the foregoing that the intent of the legislature was to include Appellant herein within the subjects of taxation (a non-resident of the taxing juris-

diction employed and deriving income from said employment within the taxing jurisdiction).

To accept Appellant's contention, that the Buck Act was only intended to include residents of the City within which the enclave was located, would require the court to rewrite the Buck Act from:

> No person shall be relieved from liability for any income tax levied by any state, or duly constituted taxing authority therein, having jurisdiction to levy such a tax, *by reason of his ...receiving income from transactions occurring or services performed in such area.* (Emphasis added). 4 U.S.C.A. 106(1).

to:

> ...by reason of his ...*residing within said taxing authority* and receiving income from transactions occurring or services performed in such area. (Emphasis indicating changes required to support appellant's construction).

The absurdity of Appellant's construction is even more evident when the Buck Act itself is compared to the Public Salary Tax Act of 1939. Should Appellant's construction be correct then the entire emphasized portion of the Buck Act, supra, would be superfluous duplication of an existing statute since taxation of residents of the taxing authority employed upon the federal enclave was already provided for in the Public Salary Tax Act of 1939. See Naval Academy example in *Kiker* at 637, page 22 hereof.

Furthermore, Appellant's construction of the Buck Act, viz. "All that was stated in this section of the Act was that a person could not be relieved from liability which he already had because of the fact that he resided upon any type of a federal land or that such person received his income from transactions upon any type of federal land," was specifically and unequivocally disposed of by the Court in *Kiker*, 346 Pa. at 638. See quote page 23 hereof, emphasized portion.

Appellant further argues, at page 12, Jurisdictional Statement, that a substantial federal question still exists 35 years after this Court denied certiorari in *Kiker*, justifying review thereof; that the Buck Act is not an act of recession; and that this section of the Buck Act (4 U.S.C. §106) has never been specifically reviewed by this Honorable Court. Each of these arguments is patently frivolous.

First, thirty-five years ago when the *Kiker* case was first decided this Court did not believe the issues presented therein called for further review and at least three times thereafter certiorari was either denied or an appeal was summarily affirmed. *Application of Thompson*, supra, *N.R.T.A. v. Murray*, supra, *Kenny*, supra. In the thirty-five years since *Kiker* nothing has changed in the law to effect that decision. In fact the leading case which predated *Kiker*, *Shaffer v. Carter*, supra, is still the law today:

> "With respect to the taxation of personal income, *it was plain by 1940* that states were constitutionally free to tax residents on all personal income wherever earned and non-residents on personal income earned within the state, ..." (Emphasis added) Hellerstein W., Some Reflections on the State's Taxation of a Non-resident's Personal Income, 72 Mich. L.R. 1309, 1310 (1974).

Second, whether the Buck Act was a specific act of recession is irrelevant and is nothing but a smokescreen to confuse the issues herein. The state has empowered the city to collect an income tax, 53 P.S. §15971 (See Appendix "D" hereof); the city has imposed an income tax, Philadelphia Code 19-1500 et seq.; when the state ceded land to the Federal government it reserved for itself and its political subdivision the right to levy and collect income taxes, 74 Pa. C.S.A. 120.49; the Government of the United States has consented to allow collection of income taxes from salaries

of federal employees employed on its enclaves, the Buck Act, 4 U.S.C. §106.

Finally, this section of the Buck Act has been specifically reviewed and construed in a manner adverse to appellant herein. *Howard v. Commissioners of Sinking Fund of City of Louisville*, 344 U.S. 624 (1953). At page 12 and 13 of his Jurisdictional Statement, Appellant characterizes the issues presented therein as:

> "*Whether the Louisville tax was properly an income tax under Section 110(c) of the Buck Act* and whether Louisville could geographically annex a Federal enclave into the boundaries of the city." (Emphasis added)

Compare to actual statement of the two issues by this Court:

> (1) The validity of the annexation by the City of Louisville, Kentucky, of certain Federally owned land on which a Naval Ordinance Plant is located; and (2) *the validity of the Louisville occupational tax or license fee ordinance as applied to employees of the Ordinance Plant*. (Emphasis added) 344 U.S. at 624-25.

While it is true that in *Howard* this Court was asked to make a determination as to whether this occupational license fee was an income tax within the meaning thereof under the Buck Act, the Court also said:

> Within this jurisdiction [the Naval Ordinance Plant], the right to tax income paid to employees of the Government who worked at the Ordinance Plant was granted by 4 U.S.C. §§105-110, known as the Buck Act . . . [Quotation of §§106 and 110(c) thereof omitted].
>
> Thus the right is specifically granted to the

> City of Louisville as a taxing authority of Kentucky to levy and collect a tax measured by the income or earnings of any party 'receiving income from transactions occurring or services performed in such area . . . to the same extent and with the same effect as though such area were not a Federal Area.' *In other words, Kentucky was free to tax earnings just as if the Federal Government were not there.* (Emphasis added) 344 U.S. 627-28.

In concluding this Court said:

> The City, it is conceded, can levy such a tax within its boundaries outside the Federal area. *By virtue of the Buck Act, the tax can be levied and collected within the Federal area, just as if it were not a Federal area.* (Emphasis added) 344 U.S. at 629.

In light of this clear expression of the issues and the law decided thereby, notwithstanding Appellant's attempt to manufacture an issue, it cannot be said that the questions presented herein are either new, novel or have not been heretofore decided by this Honorable Court.

Accordingly, it is respectfully submitted that the construction of the Supreme Court of Pennsylvania (certiorari denied by this Honorable Court) in *Kiker* of the Buck Act is exactly what was intended and not as suggested by Appellant. The doctrine of *stare decises* was thus correctly followed below and needs no further review by this Honorable Court.

(2) The Court Below Was Correct In Concluding That Non-Residents Of Philadelphia Employed Therein Do Receive Benefits From The City of Philadelphia.

Appellant next argues that since he receives no benefits from the City of Philadelphia he cannot be

subject to taxation by the City of Philadelphia. Such a conclusion of law is not only without merit but is unsupported by any facts contained in this record. Appellant merely makes the broad naked averment that he receives no benefits from the City. What constitutes services is merely Appellant's conclusion. He makes no averment as to what service he does or does not receive.

Furthermore, even if Appellant individually does not receive any benefits that is not the test. Merely because an individual does not avail himself of a benefit offered does not invalidate the tax ordinance. The proper test, as stated by the Courts, is whether there are services or benefits made available for Appellant's use. See *Kiker*, wherein the Supreme Court stated:

> There is no doubt that after the cession, Philadelphia was obligated to confer all the usual attributes of government — the same as those possessed by residents and citizens of Philadelphia — upon those deriving income from working on League Island; fire and police protection, the right to use all municipal facilities, etc. *This obligation can be called into play at any time the national government refuses or neglects to furnish them.* This is certainly true, as in *James V. Dravo Contracting Co.*, supra. 346 Pa. at 632-33 (emphasis added).

This situation occurred as recently as September 23, 1976 at 4:52 a.m. when the Philadelphia Fire Department was called upon by the United States Government to fight a two-alarm fire upon the grounds of the United States Naval Shipyard.

If Appellant chooses not to use the benefits and services provided for him[6] that is his individual decision and does not absolve him from any obligation to

6. See e.g. *City of Philadelphia v. Kenny, et al.*, supra, at 1353-54, quoted at 13 hereof.

pay wage tax on income earned in Philadelphia. This exact point was discussed in *Kiker*, supra:

> *The fact that the Federal government, as far as League Island is concerned, does not at this time see fit to take full advantage of the obligation of this Commonwealth, or its political subdivision the City of Philadelphia, to make available protection and benefits to persons and property on the Island, does not justify our invalidation of the income tax in question, as far as plaintiff and those in a similar position are concerned: Union Transit Co. v. Kentucky*, 199 U.S. 194. The area in which plaintiff is employed or engaged is actually no longer an island, but is now physically a part of the mainland of this Commonwealth. The reservation is immediately adjacent to Philadelphia; is geographically within its limits; and since December 31, 1940, because of the provisions of Public Act No. 819, is actually part of that City for the purposes of imposing the tax here under consideration. *Plaintiff may at all times use the streets, bridges and other facilities of the City, and also has the benefit of protection of its police and fire departments when engaging in business or pleasure in that municipality, as well as many other advantages. It is common knowledge that the City of Philadelphia cuts all ice, and keeps the Delaware River navigable from the northern limits of the City to Chester, where in the winter months navigation would otherwise be closed, making possible to plaintiff the transportation he uses to go to and return from League Island to his home in New Jersey. This is decidedly a benefit to him. These facts will be judicially noticed by the Court regardless of any allegations to the contrary contained in the bill: Pearce v. Langfit*, 101 Pa. 507; *French v. Senate*, 146 Cal. 604, 80 P. 1031; *Ft. L. Rld. Co. v. Lowe*, 27 Kan. 749, af-

firmed 114 U.S. 525; 20 Am. Jur. p. 54. Therefore, *we are convinced that the tax does not violate the Fourteenth Amendment of the Federal Constitution, that all the benefits of the facilities of Philadelphia are legally available to plaintiff, and he has no just reason to complain of the tax.* 346 Pa. at 633-34. (Emphasis added).

In support of his position Appellant cites *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 85 L.Ed. 267. Not only is *J.C. Penney* not supportive of Appellant's case, it is supportive of Appellees'. The only purpose for which Appellant cites this case is for the test to be applied for proper imposition of a tax upon a non-resident (J.C. Penney was a foreign corporation doing business in Wisconsin), (Jurisdictional Statement at 14). What Appellant ignores is the very next sentence (after the statement of the test) of this Court's Opinion:

> The substantial privilege of carrying on business in Wisconsin, which has here been given, clearly supports the tax, and the state has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders. The fact that a tax is contigent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction. 311 U.S. at 444-45.

This benefit of doing business within the taxing jurisdiction as enunciated above is clearly applicable here, too. No one is coercing, forcing or putting pressure upon Appellant to earn his living in Philadelphia. Philadelphia is providing Appellant with a substantial benefit by providing him with the opportunity to perform his services within the City of Philadelphia. In fact, it is a matter of public record the extent to which the City of Philadelphia and its officials have gone in an effort to insure that Appellant as well as all other

federal employees have jobs to earn income from. Every time the Department of Navy attempts to reduce or close activities at the Philadelphia Navy Yard, the administration has fought to have such orders rescinded. A more current example is the battle the City waged over the closing of the Frankford Arsenal which was also a federal enclave which employed many non-residents, as well as residents. This Administration, in fact, fought this proposed closing of the Frankford Arsenal to the point where Appellee City of Philadelphia actually brought suit in federal court against the Department of Army to restrain such closing and carried that fight to this Honorable Court. Even after failing before this Court, Appellee City of Philadelphia continued to fight to keep the Arsenal open. However, this battle was ultimately lost. Notwithstanding the mixed results therein, the facts remain that all the resources of the City of Philadelphia were used to the benefit of Appellant and other persons similarly situated at the Navy Yard and other federal agencies.

See also *American Commuters Association v. Levitt*, 405 F.2d 1148 (1969) wherein an attack also by New Jersey residents employed in New York challenged the validity of the New York City income tax and failed. The Court therein, relying upon *Shaffer v. Carter*, supra, and *J.C. Penney*, supra, sustained the tax and stated:

> It must be remembered that these plaintiffs have admitted that they receive earned income in New York and already receive the *substantial benefit of being able to do business there, a benefit valuable enough to them so that they suffer the ills of commuting while doing business to obtain it.* While so doing business and acquiring personal income thereby, state and City furnish the non-resident commuting worker all the general services furnished residents, such as police and fire protection. 405 F.2d at 1153. (Emphasis added).

While the allegations in Cout IV of the Complaint, that of Appellant's inability to vote in Philadelphia, since he is not a resident thereof (but of New Jersey), constitutes taxation without representation, appears to have been abandoned before this Honorable Court, this issue is covertly alluded to at page 15 of the Jurisdictional Statement. This argument too does not present an issue which is new to this Honorable Court.

Clearly the power of the City of Philadelphia to tax the salaries of civilian employees working there emanates from the United States Congress. The specific enabling legislation is the Buck Act, supra. Without the provisions embodied therein the City would be impotent to tax parties in Appellant's class. However, since Congress has expressly given permission for the tax in question, it is ridiculous for the Appellant to claim that he is being taxed without representation. Appellant is represented in Congress by his State's two senators and his Congressional district's representative. For all three Appellant can vote and seek to influence in such a way as to repeal or modify the congressional statute, through which the City has imposed the presently challenged tax.

In the past both the federal courts and this Court have had occasion to review this question. In *Hobson, et al. v. Tobriner, et al.*, 255 F. Supp. 295 (D.D.C. 1966), the United States District Court for the District of Columbia held provisions of the District of Columbia Code empowering the President of the United States with the authority to appoint the local governing body in the District was constitutional. Plaintiffs therein were all taxpayers who argued this was a denial of their right to suffrage and in effect, was taxation without representation. In dismissing this argument the Court therein, citing numerous cases decided by this Honorable Court and quoting from *Heald v. District of Columbia*, 259 U.S. 114, 124, 42 S. Ct. 434, 66 L.Ed. 852 (1922) by Mr. Justice Brandeis, stated:

Residents of the District of Columbia have been subjected to taxation without representation and the Supreme Court has repeatedly upheld the power of Congress to pass such legislation.[12] The "taxation without representation" claim is an integral part of the plaintiffs' complaint, one which carries with it classical connotations of freedom and liberty. However, it was judicially answered by Mr. Justice Brandeis in *Heald v. District of Columbia,* 259 U.S. 114, 124, 42 S.Ct. 434, 435, 66 L.Ed. 852 (1922).

> 'Finally, it is earnestly contended that the act is void, because it subjects the residents of the District to taxation without representation. Residents of the District lack the suffrage and have politically no voice in the expenditure of the money raised by taxation. Money so raised is paid into the treasury of the United States, where it is held, not as a separate fund for the District, but subject to the disposal of Congress, like other revenues raised by federal taxation. The objection that the tax is void, because of these facts, is fundamental and comprehensive. It is not limited in application to the tax on intangibles, but goes to the validity of all taxation of residents of the District. If sound, it would seem to apply, not only to taxes levied upon residents of the District for the support of the government of the District, but also to those taxes which are levied upon them for the support generally of the government of the United States. It is sufficient to say that the objection is not sound. *There is no constitutional provision which so limits the power of Congress that taxes can be imposed only upon those who have political representation.* And the cases are many in which laws levying taxes for the support of the government

of the District have been enforced during the period in which its residents have been without the right of suffrage.'

The fact that plaintiffs' claim of unconstitutionality based upon "taxation without representation" has been positively decided by the Supreme Court is an important factor in determining whether a three-judge court should be convened.

From the foregoing it is apparent that Congress has plenary power over the District of Columbia and has passed legislation from time to time setting up various forms of government. The caveats to this power appear to be few embracing only those rights of citizens which flow from the Constitution to all citizens. *It is clear that the absence of suffrage is not a bar to the power of Congress to tax the citizens of the District of Columbia, be it for local or national purposes. That portion of plaintiffs' complaint which challenges this power is deemed by the Court to be insubstantial and does not afford a basis for the convening of a three-judge court.*

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12. *Loughborough v. Blake*, 5 Wheat. 317, 5 L.Ed. 98 (1820); *Gibbons v. District of Columbia*, 116 U.S. 404, 6 S.Ct. 427, 29 L.Ed. 680 (1886); *Metropolitan Railroad Co. v. District of Columbia*, 132 U.S. 1, 10 S.Ct. 19, 33 L.Ed. 231 (1889); *Shoemaker v. United States*, supra; *Bauman v. Ross*, 167 U.S. 548, 17 S.Ct. 966, 42 L.Ed. 270 (1897); *Wilson v. Lambert*, 168 U.S. 611, 18 S.Ct. 217, 42 L.Ed. 599 (1898); Parsons v. District of Columbia, 170 U.S. 45, 18 S.Ct. 521, 42 L.Ed. 943 (1898); *District of Columbia v. Brooke*, 214 U.S. 138, 29 S.Ct. 560, 53 L.Ed. 941 (1909).

In *Breakfield v. District of Columbia*, 442 F.2d 1227 (D.C. Cir., 1971) the Court of Appeals was faced with the question of:

> . . . whether the Congress, in legislating for the District of Columbia, was constitutionally empowered to enact the provisions of the District of Columbia Income and Franchise Tax Act of 1947 which impose an income tax on individuals residing in the District notwithstanding that they then had and now have no elected representatives in the Congress. 442 F.2d at 1228.

Furthermore:

> As far back as 1820, the Supreme Court, through Chief Justice Marshall, declared unanimously that those *choosing residence in the District of Columbia have 'voluntarily relinquished the right of representation, and* . . . adopted the whole body of Congress for . . . [their] legitimate government' [citing Mr. Justice Brandeis in *Heald v. District of Columbia*, supra] 442 F.2d at 1229 (emphasis added).

In the instant case Appellant has voluntarily come to the City of Philadelphia to perform services for which he receives compensation thereby voluntarily relinquishing his right of representation. In effect, the court therein held that by voluntarily coming into the taxing authority the individual, like appellant herein, voluntarily consents to imposition of the tax without representation.

However, in the instant case there is, in fact, representation. In *State v. Williams*, 68 Conn. 131, 35 A.2d 24, aff 'd sub. nom. 170 U.S. 304 (1898), pursuant to state legislation a bridge and highway district was set up encompassing several towns. Bridge Commissioners, duly appointed under the statute, made an assessment against one of the towns for the cost of maintaining a bridge within the district. An action in mandamus was brought to compel the town's treasurer to pay the assessment. The defendant argued that the assessment by the Commissioners was illegal. He urged that since there was no vote in the selection of the

Commissioners by the townspeople, the assessment by same amounted to taxation without representation.

The Court dismissed the defendant's argument finding that taxation with representation existed inasmuch as the town inhabitants were represented in the state legislature which enacted the law which was being challenged. In the Court's own words:

> Taxes can indeed under our system of government be imposed by the full consent of those who pay them, or their representatives, and for the purposes which they approve. But the inhabitants of these towns were represented in the general assembly, by which the laws now in question were enacted. 35 A.2d at 29.

As discussed, supra, the analogy of *Williams* to the case at bar is clear. Appellant, as the townspeople in *Williams,* is represented in the legislative body from which the tax in question is authorized. If Appellant desires to take away this authorization, he has the right to vote for Senators and Representatives in the United States Congress imbued with the same concern who can seek to eliminate the Philadelphia Wage Tax as applied to persons in Appellant's class by repeal of the Buck Act. See *City v. Kenny, et al.* supra, quoted at 11-13 hereof.

The authority to impose any taxes by the City must come from the Pennsylvania General Assembly. This power was granted to the City of Philadelphia *in 1932* by the enaction of the Sterling Act, 53 P.S. §15971. See Appendix D hereof. Pursuant thereto, in *1939* the Council of the City of Philadelphia enacted a wage tax upon the earnings of Philadelphia residents and Philadelphia earnings of non-residents. Notwithstanding this express power to tax, due to decisions of this Court, *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937), said power was not extended to include Appellant, and others similarly situated until local taxing authorities,

like Philadelphia, obtained from the Federal Government the power to levy and collect income taxes from such individuals. Clearly, if Philadelphia did not have the power to levy and collect this tax without the Buck Act, repeal thereof would remove such power from Philadelphia.[7] Such action is clearly within the power of legislators duly elected by Appellant and others similarly situated.

Therefore, this Honorable Court should find that taxation with representation exists.

The only cases cited by Appellant at page 15 Jurisdictional Statement, fn 10, are *McCulloch v. Maryland,* 4 Wheaton 316 (1819) and *State v. Williams,* supra. Clearly, neither of these cases supports Appellant.

Accordingly, it is respectfully submitted that Appellees provide substantial services to both resident and non-resident alike for which it asks in return the payment of a wage tax based upon income earned by the resident and income earned in Philadelphia by the non-resident and therefore, this case does not warrant further review by this Honorable Court.

(3) The Court Below Was Correct In Concluding That The Exemption Of Wages Earned By Members Of The United States Armed Forces Is A Reasonable Classification And Does Not Violate The Equal Protection Clause Of The United States Constitution.

Appellant also argues that the exemption contained in 19-1501(8)(c) of the Philadelphia Code for "compensation paid by the United States to any person for active service in the Army, Navy or Air Force of the United States," violated the Equal Protection Clause of the United States Constitution.

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7. See Soldiers & Sailors Civil Relief Act of 1940, as amended, wherein a limitation was placed upon the power of states and political subdivisions to impose income taxes upon military personnel. 50 U.S.C. Appx. §574.

This argument is also of no moment. In each and every attempt to attack the constitutionality of the Philadelphia Wage Tax the courts have held the wage tax did not violate the Fourteenth Amendment Equal Protection provision of the Constitution. *Kiker,* supra; *Application of Thompson,* supra; *N.R.T.A. v. Philadelphia,* supra; *N.R.T.A. v. Murray,* supra; and *Kenny, et al.,* supra.

Notwithstanding the foregoing, it is respectfully submitted that this exemption too passes constitutional muster.

> The basic principles governing application of the Equal Protection Clause need no lengthy explication. The Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. [citations omitted] Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." [citation omitted] *Reed v. Reed,* 1971, 404 U.S. 71, 75-76, 92 S.Ct. 251, 254, 30 L.Ed. 2d 225, 229. To pass constitutional muster a legislative classification must bear some rational relationship to legitimate state purposes or governmental interests. *United States Department of Agriculture v. Moreno,* 1973, 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed. 2d 782, 787; *San Antonio Independent School District v. Rodriguez,* 1973, 411 U.S. 1, 40, 93 S.Ct. 1278, 36 L.Ed. 2d 16, 47; *Weber v. Aetna Casualty & Surety Co.,* 1972, 406 U.S. 164, 172, 92 S.Ct. 1400, 31 L.Ed. 2d 768, 777. *Rios v. Dillman,* 499 F.2d 329, 331 (5th Cir. 1974).

In the instant case the question must be whether the exemption of compensation paid to members of the active armed forces of the United States creates such a reasonable classification? The courts have held yes. This exact issue has also been litigated prior hereto and the decision was also adverse to taxpayer therein. *Philadelphia v. Farrell,* 35 D&C 2d 177, affirmed, per curiam, 205 Pa. Superior 263 (1965). While it is recognized that this decision is not binding upon this Honorable Court, it is respectfully submitted that the principles and logic thereof are sound and should be sustained. In *Farrell,* taxpayer, as appellant herein, was an employee of the United States Government who failed to file returns and pay Philadelphia Wage Tax. In a suit by the City for collection thereof defendant therein averred the military exemption was unconstitutional. In holding this exemption valid the Common Pleas Court held:

> We find that the basis for classification by the taxing authority in this case is entirely reasonable. It recognizes that serving in the armed services represents a sacrifice which should entitle exemption from the type of tax imposed. 35 D&C 2d at 179.

As heretofore cited, this decision was affirmed by the Pennsylvania Superior Court. Compare to similar exemption contained in Pennsylvania Personal Income Tax Act, 72 Pa. C.S.A. 7303(a)(1). See also other state and local income tax exemptions similar to that in the instant case: C.C.H. *State Tax Guide,* §15-263(11) (California); §15-443(8) (Kansas); §15-457, 459(7) (Kentucky); §15-543 (Michigan Uniform City Income Tax Ordinance adopted by 16 cities within State of Michigan); §15-548 (Minnesota); §15-698(3) (North Carolina); §15-713(11) (North Dakota); §15-736(a) (Cleveland, Ohio); §15-745 (Oklahoma); §15-758(5) (Oregon); §15-878 (Vermont); and §15-941 (Wisconsin).

In support of his argument that the military pay exemption was unconstitutional Appellant cites *Farrell*, supra, *Walters v. City of St. Louis*, 347 U.S. 231 (1954) and *California v. Buzzard*, 382 U.S. 386 (1966). None of these cases supports this proposition. Appellant cites *Farrell*, does not attempt to distinguish it, but merely implies that it is wrong. As will be seen infra, classification for the military is entirely reasonable and justified.

Walters v. St. Louis is cited for the test that to satisfy "equal protection" the differences between classes must be "real and not feigned." It shoud be noted that *Walters* did not involve a similar exemption. In fact the challenge in *Walters* was as to the propriety of differentiating between wages and profits. To make the argument that the hazards, differences and inconveniences between military life and civilian life is "feigned and not real" demonstrates either a lack of understanding of military life, a desperate attempt to create an issue before this Court or a blatant misrepresentation. See specifics infra.

Finally, *California v. Buzzard* is cited for the proposition that since the Federal government has already provided protection for military personnel by limiting their tax liability to their state of domicile, there is no need for further protection. *Buzzard* is completely distinguishable. In *Buzzard*, a serviceman, a legal domiciliary of the State of Washington, was stationed at Castle Air Force Base, California. While on temporary duty in Alabama, Captain Buzzard purchased and registered a new automobile. California refused to allow use of the car in California with Alabama license plates. Demand was made that since the car had not been registered in Washington, it should be registered in California. In compliance therewith Captain Buzzard tendered the $8.00 registration fee but refused to pay the 2% license fee based upon the value of the vehicle. This Court sustained Captain Buzzard's position and held that under Section 514 of the Soldiers and Sailors Civil Relief Act registration fee was properly demanded (which Captain Buzzard agreed to pay) but that the 2% license fee was an invalid assessment of a property tax since it was a personal property tax which can only be imposed by state of legal domicile. Clearly this case has no relationship whatsoever with the propriety of imposition of an income tax on civilian employees of the Federal government.

The crucial inquiry is thus whether the amendment to the Philadelphia Wage Tax Ordinance, creating an exempt classification for compensation to military personnel, recognizing the sacrifices, hardships, dangers, exigencies of military life, is a sufficiently rational basis. It is submitted that it is. To respond to this question one need look no further than to the Acts of the Congress of the United States which are continually affording special treatment to members of the armed services. For example, see the Soldiers and Sailors Civil Relief Act of 1940, as amended, 50 U.S.C. Appx. §501 et seq., wherein a variety of special privileges were granted to members of the armed forces[8] which are not available to civilian federal employees, like Appellant herein, or any private citizen. The purpose for this Act as stated therein is:

> [T]o provide for, strenghten and expedite the national defense under the emergent conditions

8. Such as stays, postponements or suspension of obligations, prosecution of suits, entry of enforcement of orders or decrees §513; immunity from default judgments under certain circumstances §520; stay of legal proceedings §521; immunity from fines and penalties under contracts §521; stay or vacation of execution of judgments §523; extension of statute of limitations §525; maximum interest rate §526; immunity from eviction or distress under certain conditions §530; immunity from recission or termination of installment contracts §531; termination of leases §534; immunity from sale of real property to satisfy certain tax claims §560; deferral for collection of income taxes and immunity from assessment of interest and penalty §573; liability for income tax only in state of domicile §574.

which are threatening the peace and security of the United States and to enable the United States the more successfully to fulfill the requirements of the national defense, provision is hereby made to suspend enforcement of civil liabilities, in certain cases, of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the period herein specified over which this Act . . . remains in force. 50 U.S.C. Appx. §510.

Notwithstanding the fact that this Act was enacted on October 17, 1940, the benefits thereof are still in full force and effect today and applicable to all members of the United States Armed Forces. If Appellant is correct in that participation in the Armed Forces is nothing more than a feigned difference and is no longer a sacrifice, which is a proposition to which Appellees do not subscribe, this Honorable Court must be prepared to answer why has Congress continued with the special treatment provided by this Act for members of the Armed Forces and not to civilian employees of the Federal government. It should be further noted that during the entire history of this Act, during both peacetime and wartime, civilian employees of the Federal Government, like appellant herein, have never received the privileges and benefits of this Act. See also 5 U.S.C. §5520 wherein military personnel were specifically excluded from withholding of State & local income taxes.

The encouragement of service to this nation by active service in the armed forces is certainly a legitimate state interest of the most basic sort. A classification exempting members of the armed services from taxation is a reasonable means of accomplishing this

goal and certainly providing tax relief encourages and rewards service in the armed forces. Clearly the exemption from taxation for the armed services is not a violation of equal protection.

Numerous, cases have dealt with legislative attempts to compensate for the burden borne by military personnel. In *Dameron v. Brodhead*, 345 U.S. 322, 97 L.Ed. 1041 (1953), §514 of the Soldiers and Sailors Civil Relief Act of 1940, exempting non-resident armed services members from state taxation, was challenged as unconstitutional. In upholding the exemption Mr. Justice Reed speaking for the majority stated,

> "The constitutionally of federal legislation exempting servicemen from the substantial burdens of seriate taxation by the states in which they may be required to be present by virtue of their service, cannot be doubted . . ."
>
> "We have in fact generally recognized the especial burdens of required service with the armed services in discussing the compensating benefits Congress provides."(citations omitted) 345 U.S. at p. 324, 325.

In *August v. Bronstein*, 369 F. Supp. 190 (1974), affirmed 417 U.S. 301 94 S.Ct. 2596, 41 L.Ed. 2d 208 (1974), a New York veterans preference statute was upheld against constitutional challenge. In that case that court noted that a long legislative history to explain the granting of a benefit to a veteran was not necessary since the purpose of such legislation is obvious.

> While little has been written on the legislative history of these preferences, it is apparent to anyone who has lived through periods of war that contrived explanations are not necessary. The preference is a token of gratitude conferred by New York upon its sons who enter their country's service in time of war, and perhaps an encouragement to re-

turn to the service of the State thereafter. 369 F. Supp. at p. 193.

Similarly, the Fifth Circuit Court of Appeals has stated (referring to an El Paso veterans preference act),

> Although the portions of the El Paso charter cited to us by the parties contain no explicit statement of purpose, the statutory objectives are hardly mysterious given the long-standing, widespread existence of veterans' preference legislation at all levels of government. Indeed, "it is apparent to anyone who has lived through periods of war that contrived explanations are not necessary." *August v. Bronstein*, supra note 4, 369 F.Supp. at 193. Historically veterans' preference laws have been directed to three principal objectives: (1) to recognize that the experience, discipline, and loyalty that veterans gain in military service are conducive to the better performance of public duties; (2) *to encourage citizens to serve their country in time of war and to reward those who, either involuntarily or through enlistment, did so;* and (3) to aid in the rehabilitation and location of the veteran whose normal life style has been disrupted by military service. *Russell v. Hodges*, 2 Cir. 1972, 470 F.2d 212, 218; *White v. Gates*, 102 U.S. App.D.C. 346, 253 F.wd 868, cert. den., 1958, 356 U.S. 973, 2 L.Ed.2d 1147; *Feinerman v. Jones*, supra note 4, 356 F.Supp. at 259; *Koelfgen v. Jackson*, supra note 4, 355 F.Supp. at 253; *Stevens v. Campbell*, supra note 4, 332 F.Supp. at 106.
>
> Appellants do not really challenge the propriety of any of these objectives, and in any event the decisions cited above as well as the plethora of cases on which they rely — amply demonstrate that the legitmacy of the governmental interest in veterans preference legislation is beyond serious judicial dispute. (emphasis added) *Rios v. Dillman*, supra at p. 332.

Appellant hints that there is no real difference between members of the armed services and other civilian workers and that the sacrifices made by those in the military is feigned. These contentions are both ludicrous and outrageous. Besides the obvious factors of the serviceman being subjected to being relocated without recourse, a lower pay scale, submission to military justice and discipline, there is the ever present possibility of being ordered into combat or other physical danger. At a time in this nation's history when the wounds of the Viet Nam conflict have not yet fully healed, Appellant's contention that the sacrifices made by the armed services are feigned is not only erroneous, it is scandalous.

It is therefore apparent that the City of Philadelphia's exemption from taxation of members of the armed services is a reasonable classification substantially related to a legitimate and important state interest. Appellant's claim of a violation of his right to equal protection is therefore wholly without merit.

In support of Appellant's argument that there is no reasonable justification therefor, Appellant states that:

> If there is in fact such a 'sacrifice' the record in both *Farrell* and the present case is totally devoid of any proof, and Appellant has been denied an opportunity to present any evidence to the contrary (Jurisdictional Statement at 18).

In Count VI of the instant Complaint the only facts averred are the identity of John Lang, the identity of the City of Philadelphia, the identity of Charles E. Dorfman, Revenue Commissioner, that Mr. Lang was assessed Philadelphia wage tax for 1974 in the amount of $204.56 plus interest and penalties; that Mr. Lang was employed by the United States Government as a senior civilian, that Mr. Lang is employed at the United States Naval Shipyard, League Island, and that Mr. Lang is not a member of the Armed Forces. There are

no other facts of record. Appellant began this action by filing a Complaint in Equity against Appellees herein. If no facts were pleaded therein to support the legal positions asserted by appellant, it is not Appellees' responsibility. Appellant talks about "being denied an opportunity . . . to present evidence to the contrary." If such facts exist it should have been pled initially. Appellant's failure to neither plead such facts initially nor avail himself of his automatic right to amend within ten (10) days of service of the Preliminary Objections, Pa.R.C.P. 1028(c),[9] presumes that he has pled his best possible case. *Christiansen, et al. v. Philicent Corp.*, 226 Pa. Super. 157, 313 A.2d 249 (1973). For Appellant to even allege that he was denied an opportunity to prove his case is a blatant falsehood and misrepresentation. As noted, Appellant had an absolute right which he waived. Therefore no cause of action was presented and as a matter of law none exists.

The question of whether Appellant should have been afforded an opportunity to amend his Complaint to plead additional facts is a question of state law, not a constitutional question cognizable by this Honorable Court. This question has been raised in the State Courts and has been decided against Appellant. What is before this Court for review is whether on the record as it exists has Appellant pled a cause of action sufficient to establish that the classification is unreasonable.

Accordingly, upon review of the record, the complete void of factual and legal authority in support of

9. Pa.R.C.P. 1028 Preliminary Objections: (c) "a party may file an amended pleading within ten (10) days after service of a copy of Preliminary Objections." Appellant failed to exercise this right. After 10 days has elapsed the right to amend is no longer automatic and may only be done by consent of the parties or by leave of court. Goodrich-Amram 2d, Procedural Rules Service, §1028(c)(1). Appellant neither sought consent of appellees nor leave of court to amend his complaint. He proceeded on the complaint as filed. See Appendix "E" hereof.

Appellant's assertion of unconstitutionality, a decision of the Pennsylvania Superior Court holding the military exemption valid and constitutional, and the provisions of the Soldiers and Sailors Civil Relief Act, supra, it is respectfully submitted that as a matter of law, the constitutionality of the military exemption should be sustained and not reviewed.

(4) The Court Below Was Correct In Concluding That Imposition Of The Philadelphia Income Tax Does Not Violate Any Constitutional Right To Travel And Does Not Place A Chilling Effect And Burden On Interstate Movement.

Appellant next argues that the imposition of the wage tax violates his constitutional right to travel by placing a chilling effect on his interstate movement.

This argument of Appellant is like all the others in that it is totally without merit; however, it suffers an added affliction in that it is extremely confusing and ill conceived. In support of this contention Appellant tosses around concepts such as the right to travel and interstate movement without either defining same or demonstrating how they are violated by the Philadelphia Wage Tax. After cutting through the maze of verbiage it becomes apparent that no cases are cited by Appellant to support that which he claims. In fact, Appellant's brief discussion thereof is directed toward his disagreement with the lower Court opinion, without any support therefor, which denied Appellant's claim.

The constitutional right to travel is just not a viable issue in the case at bar. The tax which Appellant is challenging is imposed upon wages and salaries earned within the City of Philadelphia. It has absolutely nothing to do with Appellant's travel, whether through the City, to and from his employment, or anywhere else. The fact that a chilling effect on interstate movement is claimed by Appellant is without import. A

toll imposed upon motor vehicles to cross a bridge or to travel on a highway arguably has a chilling effect on travel. Taking Appellant's position to its logical conclusion said toll would be unconstitutional. Therefore, it is obvious that Appellant's argument is unsound.

The leading case on the right to travel is *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed. 2d 600 (1969). In *Shapiro*, this Court invalidated state statutes which restricted welfare benefits to persons who resided within the jurisdiction for more that one year. In striking down the residency requirements, this court analyzed the case in terms of the Equal Protection Clause of the Fourteenth Amendment and the fundamental right to travel. The court reasoned that welfare statutes discriminate among people on the basis of the longevity of their residency in such a way as to affect people's fundamental right to travel. In finding that no compelling state interest existed for the discrimination the court invalidated the statutes. According to this Court:

> Since the classification here touches on the fundamental right of interstate movement, it constitutionally must be judged by the stricter standard of whether it promotes a compelling state interest. Under this standard, the waiting period requirement clearly violates the Equal Protection Clause. 394 U.S. at 638.

From the above analysis it is quite apparent that *Shapiro* does not support the Appellant's claim that his right to interstate movement is impinged upon by the wage tax ordinance. In *Shapiro* the state welfare statutes unjustly, in the eyes of this court, discriminated on the basis of longevity of residency within the state. In the case at bar there is no classification or discrimination on any basis whatsoever by the Philadelphia Wage Tax Ordinance. The tax is imposed evenly upon all who work within the City. Therefore, a necessary

element of *Shapiro* is missing and the case cannot be used by Appellant as dispositive of the right to travel issue.

It should be noted here that both lower courts in their opinions gave great thought and analysis before reaching a conclusion that the Philadelphia Wage Tax did not violate Appellant's right to travel. Yet, Appellant, in his jurisdictional statement was completely unable in any manner, shape or form to refute this analysis or cite any cases to the contrary. This is typical of all arguments raised in this case and in all the similar cases that are clogging the court calendars in the Philadelphia Common Pleas Courts and on appeal therefrom through the state court system of the Commonwealth of Pennsylvania.

The only case cited by Appellant is that of *Crandall v. Nevada*, 73 U.S. (6 Wall) 35 (1868), which is completely inapplicable hereto. In *Crandall* the State of Nevada imposed a $1.00 per head charge upon every person passing through the state by public carrier and imposed the duty of collection thereof upon the carrier. The charge at issue herein is not imposed on Appellant's right to travel but upon income earned by him within the taxing jurisdiction. Appellant is under the absurd assumption that he only passes through the city since he is employed upon an exclusive jurisdiction federal enclave and that this tax is imposed upon such passage. He does not merely pass through the city; he is not employed upon an exclusive jurisdiction federal enclave; and this tax is not imposed upon his passage through Philadelphia. (It is imposed to compensate the City for the services it renders to him. See litany of services provided as listed in *Kenny*, supra and quoted at p. 13 hereof).

The enclave at which Appellant is employed is a partial jurisdiction enclave. To understand the difference between exclusive and partial jurisdiction enclaves one must first understand the interrelationships

between the four types of jurisdiction which the United States Government maintains over lands owned or occupied by it, exclusive jurisdiction, concurrent jurisdiction, proprietary interest, and partial jurisdiction.

Exclusive jurisdiction enclave is where the United States has acquired total domination, control and jurisdiction thereof with the sole reservation by the state being for the service of civil or criminal process.[10]

Concurrent jurisdiction enclave is where both the United States and the state have joint domination, control and jurisdiction thereof.

Proprietary interest enclave is where the state has retained total domination and control but has leased property to the United States.

Partial jurisdiction enclave is a combination of the above. It is not concurrent because domination, control and jurisdiction is concurrent only in certain reserved aspects and not over the entire enclave. It is not exclusive because more than the right to civil or criminal process has been reserved. Hence it is partial.[11]

In the instant case the right to levy and collect taxes is a specifically reserved right. 74 Pa. C.S.A. §120.49, see Appendix "A" hereof for text of reservation. Since more than the right to serve process is reserved the enclave is not exclusive jurisdiction. Since total jurisdiction is not held jointly between state and federal governments it is not concurrent jurisdiction. It is concurrent only to this limited extent. Hence it is partial jurisdiction. Therefore to the extent of imposition of taxation the enclave at which Appellant is

10. See 1 Stat. 426 (1795); *United States v. Knapp*, 26 F. Cas. 792 (NO. 15538) (S.C.N.Y. 1849); *United States v. Davis*, 25 F. Cas. 781 (NO. 14930) (C.C.D. Mass. 1829); *United States v. Cornell*, 25 F. Cas. 646 (NO. 14867) (C.C.D.R.I. 1819); and, *United States v. Travers*, 28 F. Cas. 204 (NO. 16537) (C.C.D. Mass. 1814).

11. See discussion of various types of jurisdiction. *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937) and Department of Army Pamphlet 27-21, Military Administrative Law Handbook, §§6.7 at 6-42 to 6-43.

employed is located in the City of Philadelphia and Appellant's connection therewith is far more than just passing through the City to his place of employment. He comes to the city and he is employed therein.

As discussed supra, Appellant's argument concerning the alleged infringement upon his right to travel is in reality based on a distortion of the facts and law. Appellant starts with three premises: (1) that he receives no benefits while working at his place of employment (discussed supra), (2) that a jurisdiction must render benefits in order to tax, and (3) that his only contact with the City of Phildelphia is passing through the City. From these premises Appellant's convoluted logic apparently reasons that if he must receive benefits to be taxed and he receives no benefits at work and his only contact with the City is traveling through it then he must be taxed for his contact going through the City. He then argues that his right to travel is being infringed by this alleged tax. Besides many other infirmities of Appellant's argument, discussed supra, this Honorable Court has recently ruled on the question of contact with the City by a person indistinguishable from the Appellant, showing yet another flaw in Appellant's logic. *City of Philadelphia v. Bullion*, 28 Pa. Com. 485, 368 A.2d 1375, appeal dismissed for want of a substantial federal question, ___ U.S. ___, 54 L.Ed.2d 271 (No. 77-395, Oct. 31, 1977).

In *Bullion*, another non-resident employed upon the same enclave as Appellant herein challenged the use of the Pennsylvania Long Arm Statute on a number of grounds, one of which was that Appellant lacked sufficient contact with the City of Philadelphia for the use of the Longe Arm Statute to comport with Due Process. The lower court in that case noted that the defendant therein met the minimum contact requirement by virtue of his employment in Philadelphia and therefore the use of the Long Arm Statute was reasonable. In dismissing the appeal from the lower

court's decision this Honorable Court made it clear that the defendant therein and hence the appellant in the instant case have substantial contact with the City of Philadelphia by virtue of their employment therein. Since appellant's premise that he has no contact with the City of Philadelphia is both factually and legally erroneous, his right to travel argument, which is merely a twisted conclusion based on faulty premises, also has no merit.

Accordingly, it is respectfully submitted that the Philadelphia Wage Tax does not in any way infringe upon Appellant's right to travel or impose a chilling effect on interstate movement and does not present an issue which should be reviewed by this Honorable Court.

CONCLUSION

It is respectfully submitted that Appellant has not presented any questions so substantial so as to need further argument before this Honorable Court.

WHEREFORE, Appellees respectfully move this Honorable Court to dismiss the instant appeal or, in the alternative, affirm the Order entered by the Commonwealth Court of Pennsylvania.

Respectfully submitted,

SHELDON L. ALBERT
City Solicitor
RICHARD S. KOHN
Assistant City Solicitor

By: Stewart M Weintraub
STEWART M. WEINTRAUB
Deputy City Solicitor
Attorneys for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of July, 1978, three (3) copies of the Motion to Dismiss or Affirm were personally served to Kenneth E. Aaron, Esquire, at his office, 935 Lafayette Building, Philadelphia, Pennsylvania 19106, as Counsel for Appellant. I further certify that all parties required to be served have been served.

By: Stewart M Weintraub
STEWART M. WEINTRAUB
Deputy City Solicitor
Attorney for Appellees

1580 Municipal Services Building
Philadelphia, Pennsylvania 19107

APPENDIX A

74 P.S. § 120.49 Taxes; reservation of power to levy and collect

The jurisdiction so ceded to the United States shall be upon the further condition that the Commonwealth reserves to itself, and its political subdivisions, whatever power of taxation it may constitutionally reserve to levy and collect all taxes now or hereafter imposed by the Commonwealth, and its political subdivisions, upon property, persons, and franchises within the boundaries so ceded.

1945, March 28, P.L. 91, § 4.

APPENDIX B

APPENDIX TO INCOME TAX REGULATIONS

EXCERPTS FROM THE PHILADELPHIA CODE
(as amended)

Chapter 19-1500: *Wage and Net Profits Tax*

19-1501. *Definitions.*

In this Chapter the following definitions apply:

(1) *Business.* An enterprise, activity, profession or undertaking of any nature conducted for profit or ordinarily conducted for profit, whether by an individual, co-partnership, association, governmental body or unit or agency, or any other entity;

(2) *Employee.* Any person who renders service to another for a consideration or its equivalent, under an express or implied contract, and who is under the control and direction of the latter, including temporary, provisional, casual, or part-time employment;

(3) *Employer.* An individual, co-partnership, association, corporation, governmental body or unit or agency, or any other entity, who or that employs one or more persons on a salary, wage, commission, or other compensation basis;

(4) *Net Profits.* The net gain from the operation of a business, profession, or enterprise, after provision for all allowable costs and expenses incurred in the conduct thereof, either paid or accrued in accordance with the accounting system used, without deduction of taxes based on income;

(5) *Non-resident.* An individual, co-partnership, association, corporation, or any other entity domiciled outside the City;

(6) *Person.* Every individual, co-partnership, fiduciary or association.

APPENDIX TO INCOME TAX REGULATIONS

Excerpts from the Code—(Cont'd.)

(7) *Resident.* An individual, co-partnership, association, corporation, or any other entity domiciled in the City;

(8) *Salaries, Wages, Commissions, and Other Compensation.* All salaries, wages, commissions, bonuses, incentive payments, fees, and tips that may accrue or be received by an individual, whether directly or through an agent and whether in cash or in property, for services rendered; but excluding

(a) periodical payments for sick or disability benefits and those commonly recognized as old age benefits;

(b) retirement pay, or pensions paid to persons retired from service after reaching a specific age or after a stated period of employment;

(c) any wage or compensation paid by the United States to any person for active service in the Army, Navy, or Air Force of the United States;

(d) any bonus or additional compensation paid by the United States, this Commonwealth, or any other state for such service.

19-1502. *Imposition of Tax.*

(1) An annual tax for general revenue purposes is hereby imposed as follows:

(a) On salaries, wages, commissions, and other compensation earned by residents of Philadelphia after January 1, 1950 at the rate of 1¼%, after January 1, 1957 at the rate of 1½%, after January 1, 1961 at the rate of 1⅝%, after January 1, 1966 at the rate of 2%, and after July 1, 1969 at the rate of 3%, and after July 1, 1971 at the rate of 3⅕%.

APPENDIX TO INCOME TAX REGULATIONS

Excerpts from the Code—(Cont'd.)

(b) On salaries, wages, commissions, and other compensation earned by non-residents of Philadelphia for work done or services performed or rendered in Philadelphia after January 1, 1950 at the rate of 1¼%, after January 1, 1957 at the rate of 1½%, after January 1, 1961 at the rate of 1⅝%, after January 1, 1966 at the rate of 2%, and after July 1, 1969 at the rate of 3%, and after July 1, 1971 at the rate of 3⅜%.

(c) On the net profits earned in businesses, professions, or other activities conducted by residents after January 1, 1949 at the rate of 1¼%, after January 1, 1956 at the rate of 1½%, after January 1, 1960 at the rate of 1⅝%, after January 1, 1965 at the rate of 2%, and after January 1, 1969 at the rate of 3%, and after January 1, 1971 at the rate of 3⅜%.

(d) On the net profits earned in businesses, professions or other activities conducted in Philadelphia by non-residents after January 1, 1949 at the rate of 1¼%, after January 1, 1956 at the rate of 1½%, after January 1, 1960 at the rate of 1⅝%, after January 1, 1965 at the rate of 2%, and after January 1, 1969 at the rate of 3%, and after January 1, 1971 at the rate of 3⅜%.

(1.1) Nothing herein contained shall operate to bar the right of the City to demand, sue or collect any taxes due on salaries, wages, commissions, other compensation, and net profits under any prior tax thereon.

(2) The tax imposed under 19-1502(1)(a) and (b) shall relate to and be imposed upon salaries, wages, commissions, and other compensation paid by an employer or on his behalf to any person who is employed by or renders services to him.

APPENDIX TO INCOME TAX REGULATIONS

Excerpts from the Code—(Cont'd.)

(3) The tax levied under 19-1502(1)(c) and (d) shall relate to and be imposed on the net profits of any business, profession, or enterprise carried on by any person as owner or proprietor, either individually or in association with some other person or persons.

19-1503. *Returns and Payment of Tax.*

(1) Each person whose net profits are subject to the tax imposed by this Chapter shall, on or before May 15 of each year, make and file with the Department a return on a form furnished by or obtainable from the Department setting forth the amount of such net profits earned by him during the preceding year and subject to the said tax, together with such other pertinent information as the Department may require.

(a) Where a return is made for a fiscal year or for any other period different from a calendar year, the said return shall be made within 135 days from the end of the said fiscal year or other period.

(2) Each person who is employed on a salaried, wage, commission, or other compensation basis, which is subject to a tax imposed by this Chapter and which tax is not withheld by his employer and paid to the City as provided in 19-1504, shall on or before the last day of January, April, July, and October make and file with the Department a return on a form furnished by the Department, setting forth the aggregate amount of salaries, wages, commissions and other compensation subject to the said tax earned by him for the three months ending on the last day of the month preceding, together with such other pertinent information as the Department may require.

(3) Whenever any person files a return required by 19-1503, he shall at the time of filing pay to the Department the amount of tax due thereon.

APPENDIX TO INCOME TAX REGULATIONS

Excerpts from the Code—(Cont'd.)

19-1504. *Collection at Source.*

(1) Each employer within the City who employs one or more persons on a salary, wage, commission or other compensation basis shall deduct monthly or more often than monthly, at the time of payment thereof, the tax imposed by this Chapter on the salaries, wages, commissions, and other compensation due from the said employer to the said employee, except that due to employees engaged as domestic servants, and shall, on or before the last day of April, July, October, and January of each year, make a return and pay to the Department the amount of tax so deducted for the three months ending on the last day of the month preceding.

(a) The return shall be on a form or forms furnished by the Department, and shall set forth the names and residences of each employee of said employer during all or any part of the period covered by the said return, the amounts of salaries, wages, commission, or other compensation earned during such period by each of such employees, together with such other information as the Department may require.

(b) The employer making the return shall, at the time of filing, pay to the Department the amount of tax due thereon.

(c) The failure of any employer, residing either within or outside of the City, to make such return and/or to pay such tax shall not relieve the employee from the responsibility for making the returns, paying the tax, and complying with the regulations with respect to making the returns and paying the tax.

(2) When any employer, required to make deductions or returns under 19-1504 (1), deducts an aggregate amount

APPENDIX TO INCOME TAX REGULATIONS

Excerpts from the Code—(Cont'd.)

of such tax in excess of $50 but less than $250 during any calendar month (except the months of March, June, September, and December), he shall within 25 days after the last day of such calendar month, deposit such deduction with the Department or with any bank designated by the Department, which shall in all cases be a bank designated as a City depository pursuant to 19-201 (1).

(a) Each bank so designated shall issue official receipts to the employer for the money received from him, which money shall be credited to the City's' account. Such deposits shall be reported daily to the Department.

(b) At the time of making such deposits, the employer shall file with the depository an intermediate return on a form or forms furnished by the Department.

(c) Every employer who has deposited monthly deductions as above provided shall at the time of making his quarterly return, attach thereto validated receipts issued to him by the depository and shall pay to the Department the balance due for such quarter.

(3) When any employer required to make deductions or returns under §19-1504 (1), deducts an aggregate amount of such tax of $250 or more during any calendar month, he shall within three banking days after each payroll period deduction date deposit the actual amount of tax deducted for that payroll period in the same manner as provided pursuant to §19-1504 (2), but in no event shall an employer be required to make such deposit more frequently than one in any seven (7) day period.

(a) At the time of each deposit, the employer shall file with the Department or designated bank a depository form to be furnished by the Department which shall contain such information as the Department may require.

APPENDIX TO INCOME TAX REGULATIONS

Excerpts from the Code—(Cont'd.)

(4) *Penalties.*

For late deposits of withheld taxes due under this section there shall be added, in addition to the penalties set forth in Section 19-508 a penalty of 10% of the underpayment.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil 377-71

NON-RESIDENT TAXPAYERS ASSOCIATION, etc., et als
v.
THE MUNICIPALITY OF PHILADELPHIA, et als

NOTICE OF ALLOCATION
and
ASSIGNMENT

Pursuant to Rule 11 of the General Rules of this Court, I have allocated the above entitled matter to *CAMDEN*.

Please file all pleadings and make all motions returnable there.

THIS ACTION HAS BEEN ASSIGNED TO THE HONORABLE MITCHELL H. COHEN, JUDGE.

ANGELO W. LOCASCIO, *Clerk*

by
PATRICK H. RONGA, *Deputy Clerk*

March 15, 1971
Date

THE COURT HAS DIRECTED THAT COUNSEL BE INFORMED THAT THERE WILL BE STRICT ENFORCEMENT OF GENERAL RULE 15 A OF THE LOCAL RULE OF THIS COURT, (Completion of discovery proceedings), AND SANCTIONS MAY BE IMPOSED FOR FAILURE TO COMPLY WITH THE RULE AND ORDERS ENTERED PURSUANT THERETO; INCLUDING DISMISSAL OF THE ACTION AND SUPPRESSION OF THE DEFENSE.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No.
Complaint

NON-RESIDENT TAXPAYERS ASSOCIATION, a corporation on behalf of itself, its members and other persons who have been and will be similarly situated in the same class and classes of persons, AUGUST FANELLI, MICHAEL NOLE, HENRY STRAUB, JOHN DI FILIPPO, HARRY CANDARA and EDWIN SILVERSTEIN, on behalf of themselves and other persons similarly situated in the same class and classes of persons, *Plaintiffs*,

v.

THE MUNICIPALITY OF PHILADELPHIA, THOMAS ROGERS, individually and in his official capacity as Director of the Department of Collections of the Municipality of Philadelphia. THE COMMONWEALTH OF PENNSYLVANIA, MILTON SHAPP, individually and in his official capacity as Governor of the Commonwealth of Pennsylvania, UNITED STATES GOVERNMENT, GEORGE SCHULTZ, Director of the Office of Management and the Budget, individually and in his official capacity; JOHN CHAFEE, Secretary of the Navy, individaully and in his official capacity; jointly, individually and in the alternative, *Defendants*.

1. Jurisdiction is founded on diversity of citizenship and amount, 28 U. S. C. Sec. 1332, on a federal question and amount 28 U. S. C. Sec 1331, on the deprivation of civil rights 28 U. S. C. Sec. 1343 and 28 U. S. C. Sec. 1346 (2) for that part of the action against the United States arising under the regulations of the Executive Department in an amount for less than $10,000.00, 28 U. S. C. Secs. 2201 and 2202, and 28 U. S. C. Secs. 2281 and 2284, this being an action for declartory judgment, preliminary and permanent injunction to prevent irreparable harm and damages to the plaintiffs.

2. Plaintiffs are the Non-Resident Taxpayers Association, a corporation incorporated under the laws of the State of New Jersey, August Fanelli, Michael Nole, Henry Straub, William R. O'Toole, Harry Candara, John Di Filippo and Edwin Silverstein, individually and as a class who are citizens and residents of New Jersey, but who are employed in the Municipality of Philadelphia in the Commonwealth of Pennsylvania. Plaintiffs, August Fanelli, Michael Nole and Henry Straub are employed at the Philadelphia Naval Yard at League Island by the Federal Government and the suit is brought for all members of the class or classes of persons who are citizens and domiciliaries of New Jersey, but who are employed by the Federal Government at the Philadelphia Naval Yard and other naval installations in the Municipality of Philadelphia in the Commonwealth of Pennsylvania who now pay the Philadelphia Wage Tax, i.e., Wage and Net Profits Tax Ordinance, December 13, 1939 later amended, now Sec. 19-1500 of the Philadelphia Code and who will pay the Pennsylvania State Income Tax as applicable to non-residents of the Commonwealth for income earned in the Commonwealth, said Act which was recently enacted and signed into law. A copy of which is not yet available.

3. Defendants are The Municipality of Philadelphia, a municipal corporation chartered under the laws of Pennsylvania, Thomas Rodgers, Director of the Department of Collections of the Municipality of Philadelphia individually and in his official capacity, The Commonwealth of Pennsylvania, Milton Shapp, Governor of the Commonwealth of Pennsylvania, individually and in his official capacity. Joined as defendants individually, jointly and in the alternative are the United States Government, George P. Schultz, Director of the Bureau of the Budget, individually and in his official capacity and John Chafee, Secretary of the Navy, individually and in his official capacity.

4. This action is brought in accordance with Rule 23 of the Federal Rules of Civil Procedure.

5. Plaintiffs assert that the class is so numerous that joinder of all persons is impractical. There are approximately 15,000 non-federal New Jersey resident who are employed in Philadelphia and who now pay the Philadelphia Wage Tax and who are now liable to pay the Pennsylvania State Income Tax. There are also approximately 1,000 federal employees who are residents of New Jersey who are employed at the Philadelphia Naval Yard at League Island or at other naval installations within the Municipality of Philadelphia, who pay the Philadelphia Wage Tax and who now are liable for the Pennsylvania State Income Tax.

6. There are questions of law and fact common to the class i.e., whether citizens and residents of New Jersey can be forced to pay the Philadelphia Wage Tax and the Pennsylvania State Income Tax whether employees who are residents of New Jersey working for and on a federal reservation can be made liable to pay the Philadelphia Wage Tax and the Pennsylvania State Income Tax.

7. The claims and defenses of the representative parties are typical of the claims and defenses of the class as will be more fully explained in this complaint.

8. Plaintiff alleges that the representative parties will fairly and adequately protect the interests of the class.

9. Further under Rule 23blB, plaintiffs allege that adjudication with respect to individual members of the class would as a practical matter be dispositive of the interests of the other members not parties to the adjudication and substantially impair or impede their ability to protect their interests.

10. The defendants have failed to act on grounds generally applicable to the class as a whole as the complaints against New Jersey residents attached as Exhibit A indicate thereby making appropriate final injunctive relief

and/or declaratory relief with respect to the class as a whole.

11. Defendants allege that questions of law or fact common to the members of the class predominate over any questions affecting only individual members i.e., whether citizens and residents of New Jersey are liable for the Pennsylvania State Income Tax and the Philadelphia Wage Tax that a class action is superior to the other methods available since the litigation attached in Exhibit A could create a risk of inconsistent or varying adjudications and would establish incompatible standards.

12. Plaintiffs allege that the value of the matter in controversy exceeds exclusive of interests and costs the sum of Ten thousand dollars ($10,000.00) in that the plaintiffs pay more than ten thousand dollars to the Municipality of Philadelphia and are damaged by more than ten thousand dollars ($10,000.00) each year by said taxes.

13. Plaintiffs are a corporation incorporated under the laws of New Jersey and the named individuals, who are citizens and residents of New Jersey and the class of members, who are citizens and residents of New Jersey.

14. Defendants to the diversity action brought under 28 U. S. C. Sec. 1332, are Philadelphia, a municipal corporation under the Laws of the Commonwealth of Pennsylvania, Thomas Rogers, individually and in his official capacity as Director of the Department of Collections of the Municipality of Philadelphia and Milton Shapp, Governor of the Commonwealth of Pennsylvania, individually and in his official capacity, and the Commonwealth of Pennsylvania.

15. The federal question with respect to defendants named in Paragraph 15 of the complaint arises under the following provisions of the Constitution of the United States: Article I Section 10 Clause 1, Article I Section 8

Clause 3, Article I Section 8 Clause 1, Article I Section 10 Clause 2, Article IV Section 2 Clause 17, Article I Section 8 Clause 17, Article VI Section 2, the Fifth Amendment, Section 1 of the Fourteenth Amendment, the due process equal protection and privileges and immunities clauses thereof.

16. The defendants have been and are continuing to deprive plaintiffs of certain rights, privileges and immunities secured by the Constitution of the United States thereby causing them irreparable injury by the continual collection of the Philadelphia Wage Tax which is to them unconstitutional and in violation of their rights.

17. The defendants alleged in Paragraph 15 have violated the sovereignty of the of the State of New Jersey by imposing the aforesaid taxes on citizens and residents of New Jersey.

18. The defendants alleged in Paragraph 15 of the complaint have violated the principle of duality of sovereignty between the federal and state governments by imposing taxes on employees who are employed by and work in an area under the exclusive control of the federal government.

19. The jurisdiction of this court with respect to defendants alleged in Paragraph 15 of this complaint is involved pursuant to the provisions of Title 28 U. S. C. Sec 1343 (3) this being a suit in equity which is authorized by law. Title 42 U. S. C. Sec. 1983, to be brought to redress the deprivation under color of state law, statute, ordinance, regulation, custom or usage of rights, privileges and immunities secured by the Constitution and laws of the United States or by any act of Congress providing for equal rights of citizens. The rights here sought to be redressed are rights guaranteed by the due process and equal protection and privileges and immunities clauses of the 14th Amendment

and Title 42 U. S. C. Sec. 1983 as hereinafter more fully appears.

20. Plaintiffs allege that since they are non-residents of the Municipality of Philadelphia and the Commonwealth of Pennsylvania said defendants are without jurisdiction to impose an income tax upon them and the imposition of said tax on them deprives them of due process, equal protection, their right of employment, their right to travel in interstate commerce and the privileges and immunities of citizens of the United States and New Jersey.

21. Jurisdiction against the United States, George Schultz as Director of the Bureau of the Budget, individually and in his official capacity and against John Chafee, Secretary of the Navy rests upon 28 U. S. C. Sec. 1346 (2).

22. Plaintiffs, August Fanelli, Michael Nole and Henry Straub, and members of the class of employees who work at the Philadelphia Naval Yard on League Island and other federal installations in Philadelphia, and who are residents and citizens of New Jersey. Plaintiffs allege that Circular No. A-38 Revised of the Executive Office of the President Office of Management and Budget (Exhibit B of the Complaint) which authorizes W2 and 1099 to be sent to the Municipality of Philadelphia violates the due process clause of the 5th Amendment, the right to exercise constituional guarantees and the right of privacy, and has caused irreparable damage to plaintiffs and continues to cause irreparable damages and harm to plaintiffs.

23. The plaintiffs alleged in Paragraph 23 of the complaint, further allege that joint instruction 12750.2B Disc HQ Staff Instruction 1406.3B Paragraph 6F95)-6F(6)(d) (Exhibit C of Complaint) which disciplines employees for "Failure to honor just debts without good cause" violates plaintiffs' right to privacy, equal protection, free speech, due process, public employment, and the free exercise of

said constitutional rights, and is a prior restraint upon the exercise of the right of free speech and possesses a chilling effect on the exercise of the right of free speech, thereby violating the first Amendment to the Constitution of the United States thus making said regulation void and null.

24. There is no nexus between plaintiffs fight against the Philadelphia Wage Tax and the federal governments threat to remove plaintiffs from their position so as to justify said action by the federal government.

25. Plaintiffs allege that Article I Section 8 Clause 3 which gives the Congress exclusive power to regulate commerce among the states is violated by the Philadelphia Wage Tax and Pennsylvania State Income Tax.

26. Therefore, the Supremacy Clause of Article VI Section 2 requires that said taxes be declared void since there is a conflict between local and federal jurisdiction in an area where the national government has exclusive jurisdiction.

27. The aforesaid taxes impair the obligation of contracts between non-residents and their employers in violation of Article I Section 10 Clause 1 by causing discharge of employees for failure to pay the tax.

28. Article I Section 10 Clause 2 says no state may lay imports or duties on imports and exports. The taxes in question are duties on the import and export of the employment and labor of plaintiffs.

29. Taxes on interstate commerce are the subject of the exclusive jurisdiction of Congress. Said taxes are in reality taxes on interstate commerce and therefore void.

30. Article I Section 8 Clause 1 is violated because said taxes give preference in interstate commerce to residents while discriminating against non-residents by bestowing an unequal and unreasonable quantum of benefits

upon non-residents as compared to residents while taxing both equally.

31. Article I Section 8 Clauses 1, 4, 5 and 6 are manifestations that commerce among the states is to be under the exclusive control of Congress. The aforesaid taxes are direct taxes on interstate commerce and therefore void.

32. Article I Section 8 Clause 17 gives Congress exclusive control over all areas ceded by the states to the federal government. Any taxes on employees employed on such reservation i.e., the Philadelphia Naval Yard is in violation of this clause.

33. The Buck Act 4 U. S. C. §104,105 is inapplicable because it gives the states authority to tax said areas only if they have such jurisdiction. Neither Philadelphia nor Pennsylvania have such jurisdiction to tax non-residents there being no sufficient nexus between plaintiffs and defendants.

34. Plaintiffs are subject to double and cumulative taxation by the imposition of aforesaid taxes thereby violating their right to equal protection, privileges and immunities, due process and the right to be free from undo burdens in interstate commerce.

35. Plaintiffs allege that they are denied the following benefits from the Commonwealth of Pennsylvania and/or the Municipality of Philadelphia: the eligibility for public assistance under 62 PURD. Stat. Sec. 2508.1(6) (Exhibit D), the benefit of enrolling their children in the public schools of the Municipality of Philadelphia (Exhibit E), the benefits of free public library privileges (Exhibit F), the benefits of free tuition at Philadelphia Community College (Exhibit G), the benefit of voting in Philadelphia (Exhibit H), the benefit of running for public office in Philadelphia (Exhibit I), the benefit of holding municipal positions of employment (Exhibit J) and any veterans' benefits (Exhibit K).

36. Plaintiffs civil rights both personal and property under 42 U. S. C. Sec. 1983 are violated by depriving plaintiffs of the benefits alleged in Paragraph 35, but placing the same tax rates upon them as individuals who receive the benefits alleged.

37. Said scheme denies equal protection and due process there being no sufficient justification for said discriminating scheme; no sufficient nexus between plaintiffs and defendants Philadelphia and Pennsylvania for said taxes at an equal rate as residents of Philadelphia and Pennsylvania.

38. Said taxes make no distinction between residents and non-residents; however, the benefits received from said taxes create an arbitrary and unreasonable distinction between residents and non-residents. Such arbitrary and unreasonable distinctions violate due process and equal protection as well as the fundamental principal that taxes should bear some reasonable relationship to benefits received for such taxes. There is no relationship at all between the taxes in question and the benefits received. Therefore, the tax must fail as a violation of due process and equal protection.

39. Philadelphia lacks jurisdiction to tax non-residents i.e., residents of another sovereign state for the privilege of employment and said taxation violates the privileges and immunities clause of the 14th Amendment and Article IV Section 2 of the Constitution by denying to New Jersey residents the privileges and immunities of New Jersey citizens and national citizens to be free from taxation by states of interstate commerce, to enjoy employment, due process and equal protection and civil rights under 42 U. S. C. Sec. 1983.

40. Taxation of persons and things outside the jurisdiction (for taxation purposes) of the state and within the jurisdiction of another state violates due process, equal protection and the sovereignty of said state.

41. Conversely, a state has jurisdiction (for taxation purposes) of persons and things within its territory which do not belong to other jurisdictions.

42. A state has no jurisdiction (for taxation purposes) over persons or things which another sovereign power has exclusive jurisdiction. Residents of New Jersey are under the exclusive jurisdiction of New Jersey for the purposes of state taxation.

43. The sovereign power of Pennsylvania and the Municipality of Philadelphia does not extend to New Jersey citizens therefore there can be no taxation of said New Jersey citizens.

44. Travelers in interstate commerce receive police and fire protection, the benefits of highways and streets, but unlike New Jersey residents who are employed in Philadelphia and Pennsylvania they pay no tax on the privilege to engage in interstate commerce as do New Jersey residents who work in Philadelphia and Pennsylvania.

45. Plaintiffs repeat and allege all the facts in Paragraphs 21-23 of the complaint.

46. By submitting W2 and 1099 forms to the defendants Philadelphia and Pennsylvania, defendant, George Schultz infringes on the plaintiffs' right to privacy and deprives plaintiffs of equal protection and due process and public employment since submission of said forms amounts to the taking of the plaintiffs personal and real property. Once said forms are submitted to the states as a practical matter, plaintiffs become liable for the tax. This is an infringement of the contract of employment between the employee and the employer, since if the tax is not paid said contract can be severed by the employer.

47. Plaintiffs maintain that their fiscal situations are protected from infringement by the Bureau of the Budget by their right of privacy, which is violated each time W2 and 1099 forms are released to the Municipality of Philadelphia there being no sufficient contacts between Philadelphia and said employees to require the invasion of the privacy of their fiscal situations.

48. The action taken by the Department of the Navy as explained in Joint Instruction 12750.2B whereby plaintiffs can be suspended and fined violates plaintiffs right of free speech, due process and equal protection by depriving plaintiffs of their employment in a discriminatory manner based on the exercise of plaintiffs right of free speech by refusing to pay the Philadelphia Wage Tax. Said instruction is in effect a prior restraint upon the exercise of free speech and has a chilling effect upon the exercise of that right. The penalty for the exercise of free speech would be the loss or at the very least suspension for a period of time from plaintiffs respective positions of employment.

49. Plaintiffs allege that 28 U. S. C. Sec. 1346 is inapplicable since the Courts of the state of Pennsylvania have upheld the Philadelphia Wage Tax and therefore, no plain, speedy and efficient remedy exists under state law.

WHEREFORE, plaintiffs respectfully pray that:

1. The Court convene a three judge District Court as required by Title 28 U. S. C. Secs. 2281 and 2284.

2. The court declare that the Philadelphia Wage Tax i.e., Income Tax Ordinance of December 13, 1939, Sec. 19-1500 of the Philadelphia Code and the Pennsylvania State Income Tax as it applies to non-residents unconstitutional or in the alternative that said taxes be apportioned with respect to non-residents according to the lesser degree of benefits that they receive.

3. The court declare judgment as to the rights and liabilities of the parties with respect to the said taxes in question according to 28 U. S. C. Secs. 2201 and 2202.

4. The court preliminarily enjoin and after full hearing, permanently enjoin the defendants alleged in Paragraph 14 from enforcing the Income Tax Ordinance of December 13, 1939, Sec. 19-1500 of the Philadelphia Code as to plaintiffs and all members of the class of non-residents who pay said taxes and enjoin the proposed collection of the Pennsylvania State Income Tax as to non-residents.

5. The court preliminarily enjoin and, after full hearing permanently enjoin George Schultz and the Bureau of the Budget from enforcing Circular No. A-38 (Revised) whereby W2 and 1099 forms are sent to the Municipality of Philadelphia.

6. The court preliminarily enjoin and, after full hearing permanently enjoin the Secretary of the Navy from enforcing Joint Instruction 12750.2B whereby employees can be disciplined for exercising freedom of speech by failing to pay the Philadelphia Wage Tax.

7. The court grant such relief as shall be necessary and proper, including damages for all taxes deemed wrongfully paid.

BALLEN, BATOFF & LASKIN
Attorneys for Plaintiffs

By: _____
Lee B. Laskin

STATE OF NEW JERSEY }
COUNTY OF CAMDEN } ss

The undersigned NON-RESIDENT TAXPAYERS ASSOCIATION, being duly sworn according to law, deposes and says that it is plaintiff in the foregoing action and that the facts set forth therein are true and correct to the best of its information, knowledge and belief.

NON-RESIDENT TAXPAYERS ASSN.

By: MICHAEL NOLE
Michael Nole, *President*

ATTEST:

AUGUST J. FANELLI
Secretary

Sworn and subscribed to before me this 12th day of March, 1971.

LEE B. LASKIN

STATE OF NEW JERSEY }
COUNTY OF CAMDEN } ss

The undersigned AUGUST FANELLI, MICHAEL NOLE, HENRY STRAUB, JOHN DI FILIPPO, HARRY CANDARA and EDWIN SILVERSTEIN, being duly sworn according to law, depose and say that they are plaintiffs in the foregoing action and that the facts set forth therein are true and correct to the best of their information, knowledge and belief.

AUGUST FANELLI
August Fanelli

MICHAEL G. NOLE
Michael G. Nole

HENRY STRAUB
Henry Straub

JOHN DI FILIPPO
John Di Filippo

HARRY CANDARA
Harry Candara

EDWIN SILVERSTEIN
Edwin Silverstein

Sworn and subscribed to before me this 12th day of March, 1971.

LEE B. LASKIN

APPENDIX D

ARTICLE II. SUBJECTS OF TAXATION

Cross References

Municipalities in general, subjects of taxation, see section 6851 et seq. of this title.

§15971. Persons, transactions, occupations, privileges, subjects, personalty; state employee compensation deduction; remission

(a) From and after the effective date of this act, the council of any city of the first class shall have the authority by ordinance, for general revenue purposes, to levy, assess and collect, or provide for the levying, assessment and collection of, such taxes on persons, transactions, occupations, privileges, subjects and personal property, within the limits of such city of the first class, as it shall determine, except that such council shall not have authority to levy, assess and collect, or provide for the levying, assessment and collection of, any tax on a privilege, transaction, subject or occupation, or on personal property, which is now or may hereafter become subject to a State tax or license fee. If, subsequent to the passage of any ordinance under the authority of this act, the General Assembly shall impose a tax or license fee on any privilege, transaction, subject or occupation, or on personal property, taxed by any city of the first class hereunder, the act of Assembly imposing the State tax thereon shall automatically vacate the city ordinance passed under the authority of this act as to all taxes accruing subsequent to the effective date of the act imposing the State tax or license fee. It is the intention of this section to confer upon cities of the first class the power to levy, assess and collect taxes upon any and all subjects of taxation which the Commonwealth has power to tax but which it does not now tax or license, subject only to the foregoing provisions that any

APPENDIX E

Rule 1028. Preliminary Objections

(c) A party may file an amended pleading as of course within ten (10) days after service of a copy of preliminary objections. The court shall determine promptly all preliminary objections. If an issue of fact is raised, the court shall take evidence by depositions or otherwise.